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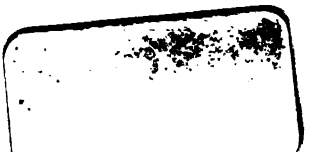

Sr MATTHEW HALE K^t

JUSTITIA ET ÆQUITAS.

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COMMENTARIES

ON THE

Laws of England.

BOOK THE FOURTH.

BY

Sir WILLIAM BLACKSTONE, Knt.
ONE OF THE JUSTICES OF HIS MAJESTY'S
COURT OF COMMON PLEAS.

THE THIRTEENTH EDITION,
WITH THE LAST CORRECTIONS OF THE AUTHOR;
AND WITH NOTES AND ADDITIONS
By EDWARD CHRISTIAN, Esq.
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LONDON:
PRINTED BY A. STRAHAN,
LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY,
FOR T. CADELL JUN. AND W. DAVIES IN THE STRAND.
1800.

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COMMENTARIES

ON THE

LAWS OF ENGLAND.

BOOK THE FOURTH.

OF PUBLIC WRONGS.

CHAPTER THE FIRST.

OF THE NATURE OF CRIMES; AND THEIR PUNISHMENT.

WE are now arrived at the fourth and laſt branch of theſe commentaries; which treats of *public wrongs*, or *crimes* and *miſdemeſnors*. For we may remember that, in the beginning of the preceding volume[a], wrongs were divided into two ſpecies: the one *private*, and the other *public*. Private wrongs, which are frequently termed civil injuries, were the ſubject of that entire book: we are now therefore, laſtly, to proceed to the conſideration of public wrongs, or crimes and miſdemeſnors; with the means of their prevention and puniſhment. In the purſuit of which ſubject I ſhall conſider, in the firſt place, the general nature of crimes and puniſhments; ſecondly, the perſons capable of committing crimes;

[a] Book III. ch. 1.

thirdly, their several degrees of guilt, as principles or accessaries; fourthly, the several species of crimes, with the punishment annexed to each by the laws of England; fifthly, the means of preventing their perpetration; and sixthly, the method of inflicting those punishments, which the law has annexed to each several crime and misdemesnor.

FIRST, as to the general nature of crimes and their punishment; the discussion and admeasurement of which forms in every country the code of criminal law; or, as it is more usually denominated with us in England, the doctrine of the *pleas of the crown*; so called, because the king, in whom centers the majesty of the whole community, is supposed by the law to be the person injured by every infraction of the public rights belonging to that community, and is therefore in all cases the proper prosecutor for every public offence [b].

THE knowlege of this branch of jurisprudence, which teaches the nature, extent, and degrees of every crime, and adjusts to it it's adequate and necessary penalty, is of the utmost importance to every individual in the state. For (as a very great master of the crown law [c] has observed upon a similar occasion) no rank or elevation in life, no uprightness of heart, no prudence or circumspection of conduct, should tempt a man to conclude, that he may not at some time or other be deeply interested in these researches. The infirmities of the best among us, the vices, and ungovernable passions of others, the instability of all human affairs, and the numberless unforeseen events, which the compass of a day may bring forth, will teach us (upon a moment's reflection) that to know with precision what the laws of our country have forbidden, and the deplorable consequences to which a wilful disobedience may expose us, is a matter of universal concern.

IN proportion to the importance of the criminal law, ought also to be the care and attention of the legislature in properly

[b] See Vol. I. p. 268.

[c] Sir Michael Foster, pref. to rep.

forming

forming and enforcing it. It ſhould be founded upon principles that are permanent, uniform, and univerſal; and always conformable to the dictates of truth and juſtice, the feelings of humanity, and the indelible rights of mankind: though it ſometimes (provided there be no tranſgreſſion of theſe external boundaries) may be modified, narrowed, or enlarged, according to the local or occaſional neceſſities of the ſtate which it is meant to govern. And yet, either from a want of attention to theſe principles in the firſt concoction of the laws, and adopting in their ſtead the impetuous dictates of avarice, ambition, and revenge; from retaining the diſcordant political regulations, which ſucceſſive conquerors or factions have eſtabliſhed, in the various revolutions of government; from giving a laſting efficacy to ſanctions that were intended to be temporary, and made (as lord Bacon expreſſes it) merely upon the ſpur of the occaſion; or from, laſtly, too haſtily employing ſuch means as are greatly diſproportionate to their end, in order to check the progreſs of ſome very prevalent offence; from ſome, or from all, of theſe cauſes, it hath happened, that the criminal law is in every country of Europe more rude and imperfect than the civil. I ſhall not here enter into any minute inquiries concerning the local conſtitutions of other nations; the inhumanity and miſtaken policy of which have been ſufficiently pointed out by ingenious writers of their own [4]. But even with us in England, where our crown-law is with juſtice ſuppoſed to be more nearly advanced to perfection; where crimes are more accurately defined, and penalties leſs uncertain and arbitrary; where all our accuſations are public, and our trials in the face of the world; where torture is unknown, and every delinquent is judged by ſuch of his equals, againſt whom he can form no exception nor even a perſonal diſlike; —even here we ſhall occaſionally find room to remark ſome particulars, that ſeem to want reviſion and amendment. Theſe have chiefly ariſen from too ſcrupulous an adherence to ſome rules of the antient common law, when the reaſons have ceaſed upon which thoſe rules were founded; from not

[4] Baron Monteſquieu, marquis Beccaria, &c.

repealing ſuch of the old penal laws as are either obſolete or abſurd; and from too little care and attention in framing and paſſing new ones. The enacting of penalties, to which a whole nation ſhall be ſubject, ought not to be left as a matter of indifference to the paſſions or intereſts of a few, who upon temporary motives may prefer or ſupport ſuch a bill; but be calmly and maturely conſidered by perſons who know what proviſions the laws have already made to remedy the miſchief complained of, who can from experience foreſee the probable conſequences of thoſe which are now propoſed, and who will judge without paſſion or prejudice how adequate they are to the evil. It is never uſual in the houſe of peers even to read a private bill, which may affect the property of an individual, without firſt referring it to ſome of the learned judges, and hearing their report thereon [e]. And ſurely equal precaution is neceſſary, when laws are to be eſtabliſhed, which may affect the property, the liberty, and perhaps even the lives, of thouſands. Had ſuch a reference taken place, it is impoſſible that in the eighteenth century it could ever have been made a capital crime, to break down (however maliciouſly) the mound of a fiſhpond, whereby any fiſh ſhall eſcape; or to cut down a cherry-tree in an orchard [f]. Were even a committee appointed but once in an hundred years to reviſe the criminal law, it could not have continued to this hour a felony without benefit of clergy, to be ſeen for one month in the company of perſons who call themſelves, or are called Egyptians [g] (1).

[5] It is true, that theſe outrageous penalties, being ſeldom or never inflicted, are hardly known to be law by the public: but that rather aggravates the miſchief, by laying a ſnare for the unwary. Yet they cannot but occur to the obſervation of any one, who hath undertaken the taſk of examining the

[e] See Vol. II. p. 345. [g] Stat. 5 Eliz. c. 20.
[f] Stat. 9 Geo. I. c. 22. 31 Geo. II. c. 42.

(1) The 5 Eliz. c. 20. which introduced this crime and its ſevere puniſhment, is repealed by the 23 Geo. III. c. 51.

great

great outlines of the English law, and tracing them up to their principles: and it is the duty of such a one to hint them with decency to those, whose abilities and stations enable them to apply the remedy. Having therefore premised this apology for some of the ensuing remarks, which might otherwise seem to savour of arrogance, I proceed now to consider (in the first place) the general nature of *crimes*.

I. A CRIME, or misdemesnor, is an act committed, or omitted, in violation of a public law, either forbidding or commanding it. This general definition comprehends both crimes and misdemesnors; which, properly speaking, are mere synonymous terms: though, in common usage, the word "crimes" is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are comprised under the gentler names of "misdemesnors" only (2).

THE distinction of public wrongs from private, of crimes and misdemesnors from civil injuries, seems principally to consist in this: that private wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals: public wrongs, or crimes and misdemesnors, are a breach and violation of the public rights and duties, due to the whole community, considered as a community, in it's social aggregate capacity. As if I detain a field from another man, to which the law has given him a right, this is a civil injury, and not a crime; for here only the right of an individual is concerned, and it is immaterial to the public, which of us is in possession of the land: but treason, murder, and robbery are properly ranked among crimes; since, besides the injury done to individuals, they strike at the

(2) In the English law *misdemeanour* is generally used in contradistinction to *felony*, and misdemeanours comprehend all indictable offences, which do not amount to felony; as perjury, battery, libels, conspiracies, &c.

very being of ſociety, which cannot poſſibly ſubſiſt, where actions of this ſort are ſuffered to eſcape with impunity (3).

[6] In all caſes the crime includes an injury: every public offence is alſo a private wrong, and ſomewhat more; it affects the individual, and it likewiſe affects the community. Thus treaſon in imagining the king's death involves in it conſpiracy againſt an individual, which is alſo a civil injury; but as this ſpecies of treaſon in it's conſequences principally tends to the diſſolution of government, and the deſtruction thereby of the order and peace of ſociety, this denominates it a crime of the higheſt magnitude. Murder is an injury to the life of an individual; but the law of ſociety conſiders principally the loſs which the ſtate ſuſtains by being deprived of a member, and the pernicious example thereby ſet for others to do the like. Robbery may be conſidered in the ſame view: it is an injury to *private* property; but were that all, a civil ſatisfaction in damages might atone for it: the *public* miſchief is the thing, for the prevention of which our laws have made it a capital offence. In theſe groſs and atrocious injuries the private wrong is ſwallowed up in the public: we ſeldom hear any mention

(3) The diſtinction between public crimes and private injuries ſeems entirely to be created by poſitive laws, and is referable only to civil inſtitutions. Every violation of a moral law, or natural obligation, is an injury, for which the offender ought to make retribution to the individuals who immediately ſuffer from it; and it is alſo a crime, for which he ought to be puniſhed to that extent, which would deter both him and others from a repetition of the offence. In poſitive laws thoſe acts are denominated injuries, for which the legiſlature has only provided retribution, or a compenſation in damages; but when from experience it is diſcovered that this is not ſufficient to reſtrain within moderate bounds certain claſſes of injuries, it then becomes neceſſary for the legiſlative power to raiſe them into crimes, and to endeavour to repreſs them by the terror of puniſhment, or the ſword of the public magiſtrate.

made of ſatisfaction to the individual; the ſatisfaction to the community being ſo very great. And indeed, as the public crime is not otherwiſe avenged than by forfeiture of life and property, it is impoſſible afterwards to make any reparation for the private wrong: which can only be had from the body or goods of the aggreſſor. But there are crimes of an inferior nature, in which the public puniſhment is not ſo ſevere, but it affords room for a private compenſation alſo: and herein the diſtinction of crimes from civil injuries is very apparent. For inſtance; in the caſe of battery, or beating another, the aggreſſor may be indicted for this at the ſuit of the king, for diſturbing the public peace, and be puniſhed criminally by fine and impriſonment: and the party beaten may alſo have his private remedy by action of treſpaſs for the injury which he in particular ſuſtains, and recover a civil ſatisfaction in damages. So alſo, in caſe of a public nuiſance, as digging a ditch acroſs a highway, this is puniſhable by indictment, as a common offence to the whole kingdom and all his majeſty's ſubjects: but if any individual ſuſtains any ſpecial damage thereby, as [7] laming his horſe, breaking his carriage, or the like, the offender may be compelled to make ample ſatisfaction, as well for the private injury, as for the public wrong.

UPON the whole we may obſerve, that in taking cognizance of all wrongs, or unlawful acts, the law has a double view: *viz.* not only to redreſs the party injured, by either reſtoring to him his right, if poſſible; or by giving him an equivalent; the manner of doing which was the object of our inquiries in the preceding book of theſe commentaries; but alſo to ſecure to the public the benefit of ſociety, by preventing or puniſhing every breach and violation of thoſe laws, which the ſovereign power has thought proper to eſtabliſh, for the government and tranquillity of the whole. What thoſe breaches are, and how prevented or puniſhed, are to be conſidered in the preſent book.

II. THE nature of *crimes and miſdemeſnors* in general being thus aſcertained and diſtinguiſhed, I proceed, in the next

place, to consider the general nature of *punishments*; 2. which are evils or inconveniences consequent upon crimes and misdemesnors; being devised, denounced, and inflicted by human laws, in consequence of disobedience or misbehaviour in those, to regulate whose conduct such laws were respectively made. And herein we will briefly consider the *power*, the *end*, and the *measure* of human punishment.

1. As to the *power* of human punishment, or the right of the temporal legislator to inflict discretionary penalties for crimes and misdemesnors[h]. It is clear, that the right of punishing crimes against the law of nature, as murder and the like, is in a state of mere nature vested in every individual. For it must be vested in somebody; otherwise the laws of nature would be vain and fruitless, if none were empowered to put them in execution: and if that power is vested in any *one*, it must also be vested in *all* mankind; [8] since all are by nature equal. Whereof the first murderer Cain was so sensible, that we find him[i] expressing his apprehensions, that *whoever* should find him would slay him. In a state of society this right is transferred from individuals to the sovereign power; whereby men are prevented from being judges in their own causes, which is one of the evils that civil government was intended to remedy. Whatever power therefore individuals had of punishing offences against the law of nature, that is now vested in the magistrate alone; who bears the sword of justice by the consent of the whole community. And to this precedent natural power of individuals must be referred that right, which some have argued to belong to every state, (though, in fact, never exercised by any,) of punishing not only their own subjects, but also foreign ambassadors, even with death itself; in case they have offended, not indeed against the municipal laws of the country, but against the divine laws of nature, and become liable thereby to forfeit their lives for their guilt[k].

[h] See Grotius, *de j. b. & p. l.* 2. c. 20. Puffendorf, L. of Nat. & N. b. 8. c. 3.

[i] Gen. iv. 14.

[k] See Vol. I. pag. 256.

As to offences merely againſt the laws of ſociety, which are only *mala prohibita*, and not *mala in ſe*; the temporal magiſtrate is alſo empowered to inflict coercive penalties for ſuch tranſgreſſions: and this by the conſent of individuals; who, in forming ſocieties, did either tacitly or expreſsly inveſt the ſovereign power with the right of making laws, and of enforcing obedience to them when made, by exerciſing, upon their non-obſervance, ſeverities adequate to the evil. The lawfulneſs therefore of puniſhing ſuch criminals is founded upon this principle, that the law by which they ſuffer was made by their own conſent; it is a part of the original contract into which they entered, when firſt they engaged in ſociety; it was calculated for, and has long contributed to, their own ſecurity.

THIS right therefore, being thus conferred by univerſal conſent, gives to the ſtate exactly the ſame power, and no more, over all it's members, as each individual member had naturally over himſelf or others. Which has occaſioned [9] ſome to doubt, how far a human legiſlature ought to inflict capital puniſhments for *poſitive* offences; offences againſt the municipal law only, and not againſt the law of nature: ſince no individual has, naturally, a power of inflicting death upon himſelf or others for actions in themſelves indifferent. With regard to offences *mala in ſe*, capital puniſhments are in ſome inſtances inflicted by the immediate *command* of God himſelf to all mankind; as in the caſe of murder, by the precept delivered to Noah, their common anceſtor and repreſentative[1], "whoſo ſheddeth man's blood, by man ſhall "his blood be ſhed[1]." In other inſtances they are inflicted after the *example* of the Creator, in his poſitive code of laws for the regulation of the Jewiſh republic; as in the caſe of the crime againſt nature. But they are ſometimes inflicted without ſuch expreſs warrant or example, at the will and diſcretion of the human legiſlature; as for forgery, for theft, and ſometimes for offences of a lighter kind. Of theſe we are principally to ſpeak: as theſe crimes are, none of them,

[1] Gen. ix. 6.

offences

offences againſt natural, but only againſt ſocial rights; not even theft itſelf, unleſs it be accompanied with violence to one's houſe or perſon: all others being an infringement of that right of property, which, as we have formerly ſeen, owe it's origin not to the law of nature, but merely to civil ſociety (4).

THE practice of inflicting capital puniſhments, for offences of human inſtitution, is thus juſtified by that great and good man, ſir Matthew Hale[n]: "when offences grow "enormous, frequent, and dangerous to a kingdom or ſtate, "deſtructive or highly pernicious to civil ſocieties, and to "the great inſecurity and danger of the kingdom or it's in-"habitants, ſevere puniſhment and even death itſelf is ne-"ceſſary to be annexed to laws in many caſes by the pru-"dence of lawgivers." It is therefore the enormity, or dangerous tendency, of the crime, that alone can warrant any earthly legiſlature in putting him to death that commits it.
[10] It is not it's frequency only, or the difficulty of otherwiſe preventing it, that will excuſe our attempting to prevent it by a wanton effuſion of human blood. For, though the end of puniſhment is to deter men from offending, it never can follow from thence, that it is lawful to deter them at any rate and by any means; ſince there may be unlawful methods of enforcing obedience even to the juſteſt laws. Every humane legiſlator will be therefore extremely cautious of

[n] Book II. c. 1. [o] 1 Hal. P. C. 13.

(4) It is ſtrange that the learned Judge's concluſion, *viz.* that *theft itſelf is not an offence againſt natural rights*, did not lead him to ſuſpect the fallacy of the poſition, that *the right of property owes it's origin not to the law of nature, but merely to civil ſociety*, which he has alſo advanced in a former volume, (2 vol. p. 11.) and which I have there preſumed to controvert. If theft is not a violation of the law of nature and reaſon, it would follow that there is no moral turpitude in diſhoneſty. "Non igitur magis eſt contra "naturam morbus aut egeſtas aut quid hujuſmodi quam detractio "aut appetitio alieni." CIC.

Thou ſhalt not ſteal, is certainly one of the firſt precepts both of nature and religion.

eſtabliſh-

eſtabliſhing laws that inflict the penalty of death, eſpecially for ſlight offences, or ſuch as are merely poſitive. He will expect a better reaſon for his ſo doing, than that looſe one which generally is given; that it is found by former experience that no lighter penalty will be effectual. For is it found upon farther experience, that capital puniſhments are more effectual? Was the vaſt territory of all the Ruſſias worſe regulated under the late empreſs Elizabeth, than under her more ſanguinary predeceſſors? Is it now, under Catherine II. leſs civiliſed, leſs ſocial, leſs ſecure? And yet we are aſſured, that neither of theſe illuſtrious princeſſes have, throughout their whole adminiſtration, inflicted the penalty of death: and the latter has, upon full perſuaſion of it's being uſeleſs, nay even pernicious, given orders for aboliſhing it entirely throughout her extenſive dominions[o]. But indeed, were capital puniſhments proved by experience to be a ſure and effectual remedy, that would not prove the neceſſity (upon which the juſtice and propriety depend) of inflicting them upon all occaſions when other expedients fail. I fear this reaſoning would extend a great deal too far. For inſtance the damage done to our public roads by loaded waggons is univerſally allowed, and many laws have been made to prevent it; none of which have hitherto proved effectual. But it does not therefore follow, that it would be juſt for the legiſlature to inflict death upon every obſtinate carrier, who defeats or eludes the proviſion of former ſtatutes. Where the evil to be prevented is not adequate to the violence of the preventive, a ſovereign that thinks ſeriouſly can never juſtify ſuch a law to the dictates of conſcience and humanity. To ſhed the blood of our fellow-creature is a matter that requires the greateſt deliberation, and the fulleſt conviction of our own authority: for life is the immediate gift of God to man; which neither he can reſign, nor can it be taken from him, unleſs by the command or permiſſion of him who gave it; either expreſsly revealed, or collected from [11]

[o] Grand inſtructions for framing a new code of laws for the Ruſſian empire, § 210.

the

the laws of nature or ſociety by clear and indiſputable demonſtration.

I WOULD not be underſtood to *deny* the right of the legiſlature in any country to enforce it's own laws by the death of the tranſgreſſor, though perſons of ſome abilities have *doubted* it; but only to ſuggeſt a few hints for the conſideration of ſuch as are, or may hereafter become, legiſlators. When a queſtion ariſes, whether death may be lawfully inflicted for this or that tranſgreſſion, the wiſdom of the laws muſt decide it: and to this public judgment or deciſion all private judgments muſt ſubmit; elſe there is an end of the firſt principle of all ſociety and government. The guilt of blood, if any, muſt lie at their doors, who miſinterpret the extent of their warrant; and not at the doors of the ſubject, who is bound to receive the interpretations that are given by the ſovereign power.

2. As to the *end*, or final cauſe of human puniſhments. This is not by way of atonement or expiation for the crime committed; for that muſt be left to the juſt determination of the Supreme Being: but as a precaution againſt future offences of the ſame kind. This is effected three ways: either by the amendment of the offender himſelf; for which purpoſe all corporal puniſhments, fines, and temporary exile or impriſonment are inflicted: or, by deterring others by the dread of his example from offending in the like way, "*ut* "*poena* (as Tully[p] expreſſes it) *ad paucos, metus ad omnes,* "*perveniat;*" which gives riſe to all ignominious puniſhments, and to ſuch executions of juſtice as are open and
[12] public: or laſtly, by depriving the party injuring of the power to do future miſchief; which is effected by either putting him to death, or condemning him to perpetual confinement, ſlavery, or exile. The ſame one end, of preventing future crimes, is endeavoured to be anſwered by each of theſe three ſpecies of puniſhment. The public gains equal ſecurity, whether the offender himſelf be amended by whole-

[p] *pro Cluentio*, 46.

ſome

ſome correction, or whether he be diſabled from doing any farther harm: and if the penalty fails of both theſe effects, as it may do, ſtill the terror of his example remains as a warning to other citizens. The method however of inflicting puniſhment ought always to be proportioned to the particular purpoſe it is meant to ſerve, and by no means to exceed it: therefore the pains of death, and perpetual diſability by exile, ſlavery, or impriſonment, ought never to be inflicted, but when the offender appears incorrigible: which may be collected either from a repetition of minuter offences; or from the perpetration of ſome one crime of deep malignity, which of itſelf demonſtrates a diſpoſition without hope or probability of amendment: and in ſuch caſes it would be cruelty to the public, to defer the puniſhment of ſuch a criminal, till he had an opportunity of repeating perhaps the worſt of villanies.

3. As to the *meaſure* of human puniſhments. From what has been obſerved in the former articles we may collect, that the quantity of puniſhment can never be abſolutely determined by any ſtanding invariable rule; but it muſt be left to the arbitration of the legiſlature to inflict ſuch penalties as are warranted by the laws of nature and ſociety, and ſuch as appear to be the beſt calculated to anſwer the end of precaution againſt future offences.

HENCE it will be evident, that what ſome have ſo highly extolled for it's equity, the *lex talionis*, or law of retaliation, can never be in all caſes an adequate or permanent rule of puniſhment. In ſome caſes indeed it ſeems to be dictated by natural reaſon; as in the caſe of conſpiracies to do an injury, or falſe accuſations of the innocent: to which we may add that law of the Jews and Egyptians, mentioned by Joſephus [13]
and Diodorus Siculus, that whoever without ſufficient cauſe was found with any mortal poiſon in his cuſtody, ſhould himſelf be obliged to take it. But, in general, the difference of perſons, place, time, provocation, or other circumſtances, may enhance or mitigate the offence; and in ſuch

cases retaliation can never be a proper measure of justice. If a nobleman strikes a peasant, all mankind will see, that if a court of justice awards a return of the blow, it is more than a just compensation. On the other hand, retaliation may, sometimes, be too easy a sentence; as, if a man maliciously should put out the remaining eye of him who had lost one before, it is too slight a punishment for the maimer to lose only one of his: and therefore the law of the Locrians, which demanded an eye for an eye, was in this instance judiciously altered: by decreeing, in imitation of Solon's laws[s], that he who struck out the eye of a one-eyed man, should lose both his own in return. Besides, there are very many crimes, that will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery, and the like. And we may add, that those instances, wherein retaliation appears to be used, even by the divine authority, do not really proceed upon the rule of exact retribution, by doing to the criminal the same hurt he has done to his neighbour and no more; but this correspondence between the crime and punishment is barely a consequence from some other principle. Death is ordered to be punished with death; not because one is equivalent to the other, for that would be expiation, and not punishment. Nor is death always an equivalent for death: the execution of a needy decrepid assassin is a poor satisfaction for the murder of a nobleman in the bloom of his youth, and full enjoyment of his friends, his honours, and his fortune. But the reason upon which this sentence is grounded seems to be, that this is the highest penalty that man can inflict,
[14] and tends most to the security of mankind; by removing one murderer from the earth, and setting a dreadful example to deter others: so that even this grand instance proceeds upon other principles than those of retaliation. And truly, if any measure of punishment is to be taken from the damage sustained by the sufferer, the punishment ought rather to ex-

[s] Plut. Art. b. 1. c. 28.

ceed

ceed than equal the injury: since it seems contrary to reason and equity, that the guilty (if convicted) should suffer no more than the innocent has done before him; especially as the suffering of the innocent is past and irrevocable, that of the guilty is future, contingent, and liable to be escaped or evaded. With regard indeed to crimes that are incomplete, which consist merely in the intention, and are not yet carried into act, as conspiracies and the like; the innocent has a chance to frustrate or avoid the villany, as the conspirator has also a chance to escape his punishment: and this may be one reason why the *lex talionis* is more proper to be inflicted, if at all, for crimes that consist in intention, than for such as are carried into act. It seems indeed consonant to natural reason, and has therefore been adopted as a maxim by several theoretical writers[r], that the punishment due to the crime of which one falsely accuses another, should be inflicted on the perjured informer. Accordingly, when it was once attempted to introduce into England the law of retaliation, it was intended as a punishment for such only as preferred malicious accusations against others; it being enacted by statute 37 Edw. III. ch. 18. that such as preferred any suggestions to the king's great council should put in sureties of taliation; that is, to incur the same pain that the other should have had, in case the suggestion were found untrue. But, after one year's experience, this punishment of taliation was rejected, and imprisonment adopted in its stead[s].

But though from what has been said it appears, that there cannot be any regular or determinate method of rating the quantity of punishments for crimes, by any one uniform rule; but they must be referred to the will and discretion of the legislative power: yet there are some general principles, drawn from the nature and circumstances of the crime, that may be of some assistance in allotting it an adequate punishment. [15]

[r] Becc. c. 15. [s] Stat. 38 Edw. III. c. 9.

As,

As, first, with regard to the object of it: for the greater and more exalted the object of an injury is, the more care should be taken to prevent that injury, and of course under this aggravation the punishment should be more severe. Therefore treason in conspiring the king's death is by the English law punished with greater rigour than even actually killing any private subject. And yet, generally, a design to transgress is not so flagrant an enormity, as the actual completion of that design. For evil, the nearer we approach it, is the more disagreeable and shocking; so that it requires more obstinacy in wickedness to perpetrate an unlawful action, than barely to entertain the thought of it: and it is an encouragement to repentance and remorse, even till the last stage of any crime, that it never is too late to retract; and that if a man stops even here, it is better for him than if he proceeds: for which reason an attempt to rob, to ravish, or to kill, is far less penal than the actual robbery, rape, or murder. But in the case of a treasonable conspiracy, the object whereof is the king's majesty, the bare intention will deserve the highest degree of severity; not because the intention is equivalent to the act itself; but because the greatest rigour is no more than adequate to a treasonable purpose of the heart, and there is no greater left to inflict upon the actual execution itself.

Again: the violence of passion, or temptation, may sometimes alleviate a crime; as theft, in case of hunger, is far more worthy of compassion, than when committed through avarice, or to supply one in luxurious excesses. To kill a man upon sudden and violent resentment, is less penal than upon cool deliberate malice. The age, education, and character of the offender; the repetition (or otherwise) [16] of the offence; the time, the place, the company wherein it was committed; all these, and a thousand other incidents, may aggravate or extenuate the crime[t].

[t] Thus Demosthenes (in his oration against Midias) finely works up the aggravations of the insults he had received. "I was abused, says he, by my enemy, "in cold blood, out of malice, not by "heat of wine, in the morning, publicly, before strangers as well as citizens; and that in the temple, whither "the duty of my office called me."

Further;

Fourthly: as punishments are chiefly intended for the prevention of future crimes, it is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness: and, among crimes of an equal malignity, those which a man has the most frequent and easy opportunities of committing, which cannot be so easily guarded against as others, and which therefore the offender has the strongest inducement to commit; according to what Cicero observes [u], "*ea sunt animadvertenda peccata maxime, quae difficillime praecaventur.*" Hence it is, that for a servant to rob his master is in more cases capital, than for a stranger: if a servant kills his master, it is a species of treason; in another it is only murder: to steal a handkerchief, or other trifle of above the value of twelvepence, privately from one's person, is made capital; but to carry off a load of corn from an open field, though of fifty times greater value, is punished with transportation only. And, in the island of Man, this rule was formerly carried so far, that to take away an horse or an ox was there no felony, but a trespass, because of the difficulty in that little territory to conceal them or carry them off: but to steal a pig or a fowl, which is easily done, was a capital misdemesnor, and the offender was punished with death [w].

Lastly: as a conclusion to the whole, we may observe that punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in preventing crimes, and amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions of severity. It is the sentiment of an ingenious [17] writer, who seems to have well studied the springs of human action [x], that crimes are more effectually prevented by the *certainty*, than by the *severity*, of punishment. For the excessive severity of laws (says Montesquieu [y]) hinders their

[u] Beccar. c. 6.
[v] *pro Sexto Roscio.* 40.
[w] 4 Inst. 285.
[x] Beccar. c. 7.
[y] Sp. L. b. 6. c. 13.

execution: when the punishment surpasses all measure, the public will frequently out of humanity prefer impunity to it. Thus also the statute 1 Mar. st. 1. c. 1. recites in it's preamble, "that the state of every king consists more assuredly "in the love of the subject towards their prince, than in the "dread of laws made with rigorous pains; and that laws "made for the preservation of the commonwealth without "great penalties are more often obeyed and kept, than laws "made with extreme punishments." Happy had it been for the nation, if the subsequent practice of that deluded princess in matters of religion, had been correspondent to these sentiments of herself and parliament, in matters of state and government! We may farther observe that sanguinary laws are a bad symptom of the distemper of any state, or at least of it's weak constitution. The laws of the Roman kings, and the twelve tables of the *decemviri*, were full of cruel punishments: the Porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period the republic flourished: under the emperors severe punishments were revived; and then the empire fell.

IT is moreover absurd and impolitic to apply the same punishment to crimes of different malignity. A multitude of sanguinary laws (besides the doubt that may be entertained concerning the right of making them) do likewise prove a manifest defect either in the wisdom of the legislative, or the strength of the executive power. It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium*, to every case of difficulty. It is, it must be owned, much *easier* to extirpate than to amend mankind: yet
[18] that magistrate must be esteemed both a weak and a cruel surgeon, who cuts off every limb, which through ignorance or indolence he will not attempt to cure. It has been therefore ingeniously proposed[z], that in every state a scale of crimes should be formed, with a corresponding scale of pu

[z] Beccar. c. 6.

nishments,

niſhments, deſcending from the greateſt to the leaſt: but, if that be too romantic an idea, yet at leaſt a wiſe legiſlator will mark the principal diviſions, and not aſſign penalties of the firſt degree to offences of an inferior rank. Where men ſee no diſtinction made in the nature and gradations of puniſhment, the generality will be led to conclude there is no diſtinction in the guilt. Thus in France the puniſhment of robbery, either with or without murder, is the ſame [a]: hence it is, that though perhaps they are therefore ſubject to fewer robberies, yet they never rob but they alſo murder. In China murderers are cut to pieces, and robbers not: hence in that country they never murder on the highway, though they often rob. And in England, beſides the additional terrors of a ſpeedy execution, and a ſubſequent expoſure of diſſection, robbers have a hope of tranſportation, which ſeldom is extended to murderers. This has the ſame effect here as in China; in preventing frequent aſſaſſination and ſlaughter.

YET, though in this inſtance we may glory in the wiſdom of the Engliſh law, we ſhall find it more difficult to juſtify the frequency of capital puniſhment to be found therein; inflicted (perhaps inattentively) by a multitude of ſucceſſive independent ſtatutes, upon crimes very different in their natures. It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no leſs than an hundred and ſixty have been declared by act of parliament [b] to be felonies without benefit of clergy; or, in other words, to be worthy of inſtant death. So dreadful a liſt, inſtead of diminiſhing, increaſes the number of offenders. The injured, through compaſſion, will often forbear to proſecute: juries, through compaſſion, will ſometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence: and judges, through compaſſion, will reſpite one half of the convicts, and recommend them to the [19]

[a] Sp. L. b. 6. c. 16.

[b] See Ruffhead's index to the ſtatutes (tit. felony) and the acts which have ſince been made.

royal mercy. Among ſo many chances of eſcaping, the needy and hardened offender overlooks the multitude that ſuffer; he boldly engages in ſome deſperate attempt, to relieve his wants or ſupply his vices; and, if unexpectedly the hand of juſtice overtakes him, he deems himſelf peculiarly unfortunate, in falling at laſt a ſacrifice to thoſe laws, which long impunity has taught him to contemn.

CHAPTER THE SECOND.

OF THE PERSONS CAPABLE OF COMMITTING CRIMES.

HAVING, in the preceding chapter, conſidered in general the nature of crimes, and puniſhments, we are next led, in the order of our diſtribution, to inquire what perſons are, or are not, *capable* of committing crimes; or, which is all one, who are exempted from the cenſures of the law upon the commiſſion of thoſe acts, which in other perſons would be ſeverely puniſhed. In the proceſs of which inquiry, we muſt have recourſe to particular and ſpecial exceptions: for the general rule is, that no perſon ſhall be excuſed from puniſhment for diſobedience to the laws of his country, excepting ſuch as are expreſsly defined and exempted by the laws themſelves.

ALL the ſeveral pleas and excuſes, which protect the committer of a forbidden act from the puniſhment which is otherwiſe annexed thereto, may be reduced to this ſingle conſideration, the want or defect of *will*. An involuntary act, as it has no claim to merit, ſo neither can it induce any guilt: the concurrence of the will, when it has it's choice either to do or to avoid the fact in queſtion, being the only thing that renders human actions either praiſeworthy or culpable. [21] Indeed, to make a complete crime cognizable by human laws, there muſt be both a will and an act. For though, *in foro conſcientiae*, a fixed deſign or will to do an unlawful act is almoſt as heinous as the commiſſion of it, yet, as no temporal tribunal can ſearch the heart, or fathom the intentions of the mind, otherwiſe than as they are demonſtrated by outward actions, it therefore cannot puniſh for what it can-

not know. For which reaſon in all temporal juriſdictions an *overt* act, or ſome open evidence of an intended crime, is neceſſary, in order to demonſtrate the depravity of the will, before the man is liable to puniſhment. And, as a vitious will without a vitious act is no civil crime, ſo, on the other hand, an unwarrantable act without a vitious will is no crime at all. So that to conſtitute a crime againſt human laws, there muſt be, firſt, a vitious will; and, ſecondly, an unlawful act conſequent upon ſuch vitious will.

Now there are three caſes, in which the will does not join with the act: 1. Where there is a defect of underſtanding. For where there is no diſcernment, there is no choice; and where there is no choice, there can be no act of the will, which is nothing elſe but a determination of one's choice to do or to abſtain from a particular action: he therefore, that has no underſtanding, can have no will to guide his conduct. 2. Where there is underſtanding and will ſufficient, reſiding in the party; but not called forth and exerted at the time of the action done; which is the caſe of all offences committed by chance or ignorance. Here the will ſits neuter; and neither concurs with the act, nor diſagrees to it. 3. Where the action is conſtrained by ſome outward force and violence. Here the will counteracts the deed; and is ſo far from concurring with, that it loaths and diſagrees to, what the man is obliged to perform. It will be the buſineſs of the preſent chapter briefly to conſider all the ſeveral ſpecies of defect in will, as they fall under ſome one or other of theſe general heads: as infancy, idiocy, lunacy, and intoxication, which fall under the firſt claſs; misfortune, and ignorance, which [22] may be referred to the ſecond; and compulſion or neceſſity, which may properly rank in the third.

I. FIRST, we will conſider the caſe of *infancy*, or nonage; which is a defect of the underſtanding. Infants, under the age of diſcretion, ought not to be puniſhed by any criminal proſecution whatever[a]. What the age of diſcretion is, in

[a] 1 Hawk. P. C. 2.

various

various nations, is matter of ſome variety. The civil law diſtinguiſhed the age of minors, or thoſe under twenty-five years old, into three ſtages: *infantia*, from the birth till ſeven years of age; *pueritia*, from ſeven to fourteen; and *pubertas*, from fourteen upwards. The period of *pueritia*, or childhood, was again ſubdivided into two equal parts: from ſeven to ten and an half was *aetas infantiae proxima*; from ten and an half to fourteen was *aetas pubertati proxima*. During the firſt ſtage of infancy, and the next half ſtage of childhood, *infantiae proxima*, they were not puniſhable for any crime[b]. During the other half ſtage of childhood, approaching to puberty, from ten and an half to fourteen, they were indeed puniſhable, if found to be *doli capaces*, or capable of miſchief: but with many mitigations, and not with the utmoſt rigour of the law[c]. During the laſt ſtage (at the age of puberty, and afterwards) minors were liable to be puniſhed, as well capitally, as otherwiſe.

THE law of England does in ſome caſes privilege an infant, under the age of twenty-one, as to common miſdemeſnors; ſo as to eſcape fine, impriſonment, and the like: and particularly in caſes of omiſſion, as not repairing a bridge, or a highway, and other ſimilar offences[d]: for, not having the command of his fortune till twenty-one, he wants the capacity to do thoſe things which the law requires. But where there is any notorious breach of the peace, a riot, battery, or the like, (which infants, when full grown, are at leaſt as liable as others to commit,) for theſe an infant, above the age of fourteen, is equally liable to ſuffer, as a perſon of [23] the full age of twenty-one.

WITH regard to capital crimes, the law is ſtill more minute and circumſpect; diſtinguiſhing with greater nicety the ſeveral degrees of age and diſcretion. By the antient Saxon law, the age of twelve years was eſtabliſhed for the age of poſſible diſcretion, when firſt the underſtanding might open[e]: and from thence till the offender was fourteen, it was *aetas*

[b] *Inſt.* 3. 20. 10.
[c] *Ff.* 29. 5. 14. 50. 17. 111. 47. 2. 23.
[d] 1 Hal. P. C. 20, 21, 22.
[e] *L. L. Athelſtan.* Wilk. 65.

pubertati proxima, in which he might or might not be guilty of a crime, according to his natural capacity or incapacity. This was the dubious ſtage of diſcretion: but, under twelve, it was held that he could not be guilty in will, neither after fourteen could he be ſuppoſed innocent, of any capital crime which he in fact committed. But by the law, as it now ſtands, and has ſtood at leaſt ever ſince the time of Edward the third, the capacity of doing ill, or contracting guilt, is not ſo much meaſured by years and days, as by the ſtrength of the delinquent's underſtanding and judgment. For one lad of eleven years old may have as much cunning as another of fourteen; and in theſe caſes our maxim is, that "*malitia* "*ſupplet ætatem.*" Under ſeven years of age indeed an infant cannot be guilty of felony[e]; for then a felonious diſcretion is almoſt an impoſſibility in nature: but at eight years old he may be guilty of felony[f]. Alſo, under fourteen, though an infant ſhall be *prima facie* adjudged to be *doli incapax*; yet if it appear to the court and jury, that he was *doli capax*, and could diſcern between good and evil, he may be convicted and ſuffer death. Thus a girl of thirteen has been burnt for killing her miſtreſs: and one boy of ten, and another of nine years old, who had killed their companions, have been ſentenced to death, and he of ten years actually hanged; becauſe it appeared upon their trials, that the one hid himſelf, and the other hid the body he had killed, which hiding manifeſted a conſciouſneſs of guilt, and a diſcretion
[24] to diſcern between good and evil[g]. And there was an inſtance in the laſt century, where a boy of eight years old was tried at Abingdon for firing two barns; and, it appearing that he had malice, revenge, and cunning, he was found guilty, condemned, and hanged accordingly[h]. Thus alſo, in very modern times, a boy of ten years old was convicted on his own confeſſion of murdering his bedfellow; there appearing in his whole behaviour plain tokens of a miſchievous diſcretion; and, as the ſparing this boy merely on account of his tender years might be of dangerous conſequence to the

[e] Mir. c. 4. § 16. 1 Hal. P. C. 27.
[f] Dalt. Juſt. c. 147.
[g] 1 Hal. P. C. 26, 27.
[h] Emlyn on 1 Hal. P. C. 25

public, by propagating a notion that children might commit such atrocious crimes with impunity, it was unanimously agreed by all the judges that he was a proper subject of capital punishment [1]. But, in all such cases, the evidence of that malice which is to supply age, ought to be strong and clear beyond all doubt and contradiction.

II. The second case of a deficiency in will, which excuses from the guilt of crimes, arises also from a defective or vitiated understanding, *viz.* in an *idiot* or a *lunatic*. For the rule of law as to the latter, which may easily be adapted also to the former, is, that "*furiosus furore solum punitur.*" In criminal cases therefore idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities: no, not even for treason itself [k]. Also, if a man in his sound memory commits a capital offence, and before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried: for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed: for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution [l] (1). Indeed, in the [25] bloody reign of Henry the eighth, a statute was made [m],

[1] Foster, 72.
[k] 3 Inst. 6.
[l] 1 Hal P. C. 34.
[m] 33 Hen. VIII. c. 20.

(1) If the punishment were less than death, and were inflicted upon a prisoner deprived of reason, it would be unproductive of one of the great ends of punishment, the correction of the criminal. Human tribunals are only justified in introducing the pain and evil of punishment, when it is likely to prevent that greater degree of evil, which would result from the unrestrained commission of crimes.

which

which enacted, that if a perſon, being *compos mentis*, ſhould commit high treaſon, and after fall into madneſs, he might be tried in his abſence, and ſhould ſuffer death, as if he were of perfect memory. But this ſavage and inhuman law was repealed by the ſtatute 1 & 2 Phi & M. c. 10. For, as is obſerved by ſir Edward Coke [n], "the execution of an offender is for example, *ut poena ad paucos, metus ad omnes perveniat*: but ſo it is not when a madman is executed; but ſhould be a miſerable ſpectacle, both againſt law, and of extreme inhumanity and cruelty, and can be no example to others." But if there be any doubt, whether the party be *compos* or not, this ſhall be tried by a jury. And if he be ſo found, a total idiocy, or abſolute inſanity, excuſes from the guilt, and of courſe from the puniſhment, of any criminal action committed under ſuch deprivation of the ſenſes: but, if a lunatic hath lucid intervals of underſtanding, he ſhall anſwer for what he does in thoſe intervals, as if he had no deficiency [o]. Yet, in the caſe of abſolute madmen, as they are not anſwerable for their actions, they ſhould not be permitted the liberty of acting unleſs under proper control; and, in particular, they ought not to be ſuffered to go looſe, to the terror of the king's ſubjects. It was the doctrine of our antient law, that perſons deprived of their reaſon might be confined till they recovered their ſenſes [p], without waiting for the forms of a commiſſion or other ſpecial authority from the crown: and now, by the vagrant acts [q], a method is chalked out for impriſoning, chaining, and ſending them to their proper homes (2).

[n] 3 Inſt. 6.
[o] 1 Hal. P. C. 31.
[p] Bro. *Abr. tit. corone.* 101.
[q] 17 Geo. II. c. 5.

(2) Where it is dangerous to permit a lunatic to go abroad, two juſtices may order him to be apprehended and ſecured, even with chains, if neceſſary, and may ſend him by a vagrant paſs to the place of his ſettlement; and may order ſo much of his goods to be ſold, or the rents of his lands to be received, as will diſcharge the expence incurred; but ſuch ſum muſt be accounted for at the next ſeſſions;

III. THIRDLY; as to artificial, voluntarily contracted madneſs, by *drunkenneſs* or intoxication, which, depriving men of their reaſon, puts them in a temporary phrenzy; our law looks upon this as an aggravation of the offence, rather than as an excuſe for any criminal miſbehaviour. A drunkard, ſays ſir Edward Coke[r], who is *voluntarius daemon*, hath no privilege thereby; but what hurt or ill ſoever he doth, his drunkenneſs doth aggravate it: *nam omne crimen ebrietas, et incendit, et detegit.* It hath been obſerved, that the real uſe of ſtrong liquors, and the abuſe of them by drinking to exceſs, depend much upon the temperature of the climate in which we live. The ſame indulgence, which may be neceſſary to make the blood move in Norway, would make an Italian mad. A German therefore, ſays the preſident Monteſquieu [s], drinks through cuſtom, founded upon conſtitutional neceſſity; a Spaniard drinks through choice, or out of the mere wantonneſs of luxury: and drunkenneſs, he adds, ought to be more ſeverely puniſhed, where it makes men miſchievous and mad, as in Spain and Italy, than where it only renders them ſtupid and heavy, as in Germany and more northern countries. And accordingly, in the warm climate of Greece, a law of Pittacus enacted, "that "he who committed a crime, when drunk, ſhould receive "a double puniſhment;" one for the crime itſelf, and the other for the ebriety which prompted him to commit it[t]. The Roman law indeed made great allowances for this vice: "*per vinum delapſis capitalis poena remittitur* [u]." But the law of England, conſidering how eaſy it is to counterfeit this excuſe, and how weak an excuſe it is, (though real,) will not ſuffer any man thus to privilege one crime by another [w]. [26]

[r] 1 Inſt. 247.
[s] Sp. L. b. 14. c. 10.
[t] Puff. L. of N. B. 8. c. 3.
[u] *Ff.* 49. 16. 6.
[w] Plowd. 19.

ſeſſions: but this does not preclude the juriſdiction of the chancellor, or prevent any relation or friend from taking the lunatic under his care. 17 *Geo. II. c.* 5. § 21.

IV. A

IV. A FOURTH deficiency of will, is where a man commits an unlawful act by *misfortune* or *chance*, and not by design. Here the will observes a total neutrality, and does not co-operate with the deed; which therefore wants one main ingredient of a crime. Of this when it affects the life of another, we shall find more occasion to speak hereafter; at present only observing that if any accidental mischief happens to follow from the performance of a *lawful* act, the party stands excused from all guilt: but if a man be doing any thing *unlawful*, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for, being guilty of one offence, in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehaviour [x] (3).

[27]

V. FIFTHLY: *ignorance*, or *mistake*, is another defect of will; when a man, intending to do a lawful act, does that which is unlawful. For here the deed and the will acting separately, there is not that conjunction between them, which is necessary to form a criminal act. But this must be an ignorance or mistake of fact, and not an error in point of law. As if a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family, this is no criminal action [y]: but if a man thinks he has a right to kill a person excommunicated or outlawed, wherever he meets him, and does so; this is wilful murder. For a mistake in point of law, which every person of discretion

[x] 1 Hal. P. C. 39. [y] Cro. Car. 538.

(3) But a very important distinction is made in such cases, viz. whether the unlawful act is also in it's original nature wrong and mischievous, for a person is not answerable for the incidental consequences of an unlawful act, which is merely a *malum prohibitum*; as where any unfortunate accident happens from an unqualified person being in pursuit of game, he is amenable only to the same extent as a man duly qualified. *Foſt.* 259. 1 *Hal. P. C.* 475.

not

not only may, but is bound and presumed to know, is in criminal cases no sort of defence. *Ignorantia juris, quod quisque tenetur scire, neminem excusat*, is as well the maxim of our own law [x], as it was of the Roman [a].

VI. A SIXTH species of defect of will is that arising from *compulsion*, and inevitable *necessity*. These are a constraint upon the will, whereby a man is urged to do that which his judgment disapproves; and which, it is to be presumed, his will (if left to itself) would reject. As punishments are therefore only inflicted for the abuse of that free will, which God has given to man, it is highly just and equitable that a man should be excused for those acts, which are done through unavoidable force and compulsion.

1. OF this nature, in the first place, is the obligation of [28] *civil subjection*, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest: as when a legislator establishes iniquity by a law, and commands the subject to do an act contrary to religion or sound morality. How far this excuse will be admitted *in foro conscientiae*, or whether the inferior in this case is not bound to obey the divine, rather than the human law, it is not my business to decide; though the question I believe, among the casuists, will hardly bear a doubt. But, however that may be, obedience to the laws in being is undoubtedly a sufficient extenuation of civil guilt before the municipal tribunal. The sheriff, who burnt Latimer and Ridley, in the bigoted days of queen Mary, was not liable to punishment from Elizabeth, for executing so horrid an office; being justified by the commands of that magistracy, which endeavoured to restore superstition under the holy auspices of it's merciless sister, persecution.

As to persons in private relations; the principal case, where constraint of a superior is allowed as an excuse for cri-

[x] Plowd. 343. [a] *Ff.* 22. 6. 9.

minal

minal miſconduct, is with regard to the matrimonial ſubjection of the wife to her huſband: for neither a ſon nor a ſervant are excuſed for the commiſſion of any crime, whether capital or otherwiſe, by the command or coercion of the parent or maſter [b]; though in ſome caſes the command or authority of the huſband, either expreſs or implied, will privilege the wife from puniſhment, even for capital offences. And therefore if a woman commit theft, burglary, or other civil offences againſt the laws of ſociety, by the coercion of her huſband; or even in his company, which the law conſtrues a coercion; ſhe is not guilty of any crime; being conſidered as acting by compulſion and not of her own will [c]. Which doctrine is at leaſt a thouſand years old in this kingdom, being to be found among the laws of king
[29] Ina the Weſt Saxon [d]. And it appears that, among the northern nations on the continent, this privilege extended to any woman tranſgreſſing in concert with a man, and to any ſervant that committed a joint offence with a freeman; the male or freeman only was puniſhed, the female or ſlave diſmiſſed; "*proculdubio quod alterum libertas, alterum neceſſitas* "*impelleret* [e]." But (beſides that in our law, which is a ſtranger to ſlavery, no impunity is given to ſervants, who are as much free agents as their maſters) even with regard to wives, this rule admits of an exception in crimes that are *mala in ſe*, and prohibited by the law of nature, as murder and the like (4): not only becauſe theſe are of a deeper dye; but alſo, ſince in a ſtate of nature no one is in ſubjection to another, it would be unreaſonable to ſcreen an offender from the puniſhment due to natural crimes, by the refinements and ſubordinations of civil ſociety. In treaſon alſo, (the higheſt crime which a member of ſociety can, as ſuch, be guilty of,)

[b] 1 Hawk. P. C. 3.
[c] 1 Hal. P. C. 45.
[d] *cap.* 57.
[e] Stiernh. *de jure Sueon. l.* 2. *c* 4.

(4) The law ſeems to protect the wife in all felonies committed by her in company with her huſband, except murder and manſlaughter. 1 *Hal. P. C.* 47.

no plea of coverture shall excuse the wife; no presumption of the husband's coercion shall extenuate her guilt[f]; as well because of the odiousness and dangerous consequences of the crime itself, as because the husband, having broken through the most sacred tie of social community by rebellion against the state, has no right to that obedience from a wife, which he himself as a subject has forgotten to pay. In inferior misdemesnors also, we may remark another exception; that a wife may be indicted and set in the pillory *with* her husband, for keeping a brothel; for this is an offence touching the domestic oeconomy or government of the house, in which the wife has a principal share; and is also such an offence as the law presumes to be generally conducted by the intrigues of the female sex[g]. And in all cases, where the wife offends alone, without the company or coercion of her husband, she is responsible for her offence, as much as any feme-sole.

[30]

2. ANOTHER species of compulsion or necessity is what our law calls *duress per minas*[h]; or threats and menaces, which induce a fear of death or other bodily harm, and which take away for that reason the guilt of many crimes and misdemesnors; at least before the human tribunal. But then that fear, which compels a man to do an unwarrantable action, ought to be just and well-grounded; such "*qui cadere* "*possit in virum constantem, non timidum et meticulosum*," as, Bracton expresses it[i], in the words of the civil law[k]. Therefore, in time of war or rebellion, a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels, which would admit of no excuse in the time of peace[l] (5). This however seems only, or at least principally,

[f] 1 Hal. P. C. 47.
[g] 1 Hawk. P. C. 1, 3.
[h] See Vol. I. pag. 131.
[i] *l.* 2. *f.* 16.
[k] *Ff.* 4. 2. 5. & 6.
[l] 1 Hal. P. C. 50.

(5) The fear of having houses burnt or goods spoiled is no excuse in the eye of the law for joining and marching with rebels. The only force that doth excuse is a force upon the *person*, and present fear of death; and this force and fear must continue all the time

to hold as to positive crimes, so created by the laws of society, and which therefore society may excuse; but not so to natural offences so declared by the law of God, wherein human magistrates are only the executioners of divine punishment. And therefore though a man be violently assaulted, and hath no other possible means of escaping death, but by killing an innocent person: this fear and force shall not acquit him of murder; for he ought rather to die himself, than escape by the murder of an innocent [m]. But in such a case he is permitted to kill the assailant; for there the law of nature, and self-defence, it's primary canon, have made him his own protector.

3. THERE is a third species of necessity, which may be distinguished from the actual compulsion of external force or fear; being the result of reason and reflection, which act upon and constrain a man's will, and oblige him to do an action, which without such obligation would be criminal. And that is, when a man has his choice of two evils set before him, and, being under a necessity of chusing one, he chuses the least pernicious of the two. Here the will cannot be said freely to exert itself, being rather passive, than active; or, if active, it is rather in rejecting the greater evil than in chusing the less. Of this sort is that necessity, where a man by the commandment of the law is bound to arrest another for any capital offence, or to disperse a riot, and resistance is made to his authority: it is here justifiable and even necessary to beat, to wound, or perhaps to kill the offenders, rather than permit the murderer to escape, or the riot to continue. For the preservation of the peace of the kingdom, and the apprehending of notorious malefactors, are of the utmost consequence to the public: and therefore excuse the felony, which the killing would otherwise amount to [n].

[31]

[m] 1 Hal. P. C. 51. [n] *Ibid.* 53.

time the party remains with the rebels. It is incumbent upon men, who make force their defence, to shew an actual force, and that they joined *pro timore mortis, et recesserunt quam cito potuerunt. Foſt.* 14. 216.

4. THERE

4. THERE is yet another caſe of neceſſity, which has occaſioned great ſpeculation among the writers upon general law; viz. whether a man in extreme want of food or cloathing may juſtify ſtealing either, to relieve his preſent neceſſities? And this both Grotius [o] and Puffendorf [p], together with many other of the foreign juriſts, hold in the affirmative; maintaining by many ingenious, humane, and plauſible reaſons, that in ſuch caſes the community of goods by a kind of tacit conceſſion of ſociety is revived. And ſome even of our own lawyers have held the ſame [q], though it ſeems to be an unwarranted doctrine, borrowed from the notions of ſome civilians: at leaſt it is now antiquated, the law of England admitting no ſuch excuſe at preſent [r]. And this it's doctrine is agreeable not only to the ſentiments of many of the wiſeſt antients, particularly Cicero [s], who holds that "*ſuum cuique incommodum ferendum eſt, potius quam* "*de alterius commodis detrahendum;*" but alſo to the Jewiſh law, as certified by king Solomon himſelf [t]: "if a thief "ſteal to ſatisfy his ſoul when he is hungry, he ſhall reſtore "ſevenfold, and ſhall give all the ſubſtance of his houſe:" [32] which was the ordinary puniſhment for theft in that kingdom. And this is founded upon the higheſt reaſon: for men's properties would be under a ſtrange inſecurity, if liable to be invaded according to the wants of others, of which wants no man can poſſibly be an adequate judge, but the party himſelf who pleads them. In this country eſpecially, there would be a peculiar impropriety in admitting ſo dubious an excuſe: for by our laws ſuch ſufficient proviſion is made for the poor by the power of the civil magiſtrate, that it is impoſſible that the moſt needy ſtranger ſhould ever be reduced to the neceſſity of thieving to ſupport nature. This caſe of a ſtranger is, by the way, the ſtrongeſt inſtance put by baron Puffendorf, and whereon he builds his principal arguments: which, however they may hold upon the continent, where the parſimonious induſtry of the natives

[o] *de jure b. & p. l.* 2. *c.* 2.
[p] *L. of Nat. and N. l.* 2. *c.* 6.
[q] Britton. *c.* 10. Mirr. *c.* 4. § 16.
[r] 1 Hal. P. C. 54.
[s] *de off. l.* 3. *c.* 5.
[t] Prov. vi. 30.

orders every one to work or ſtarve, yet muſt loſe all their weight and efficacy in England, where charity is reduced to a ſyſtem, and interwoven in our very conſtitution. Therefore our laws ought by no means to be taxed with being unmerciful, for denying this privilege to the neceſſitous; eſpecially when we conſider, that the king, on the repreſentation of his miniſters of juſtice, hath a power to ſoften the law, and to extend mercy in caſes of peculiar hardſhip. An advantage which is wanting in many ſtates, particularly thoſe which are democratical: and theſe have in it's ſtead introduced and adopted, in the body of the law itſelf, a multitude of circumſtances tending to alleviate it's rigour. But the founders of our conſtitution thought it better to veſt in the crown the power of pardoning particular objects of compaſſion, than to countenance and eſtabliſh theſt by one general undiſtinguiſhing law.

VII. To theſe ſeveral caſes, in which the incapacity of committing crimes ariſes from a deficiency of the will, we may add one more, in which the law ſuppoſes an incapacity of doing wrong, from the excellence and perfection of the per-
[33] ſon; which extend as well to the will as to the other qualities of his mind. I mean the caſe of the king; who, by virtue of his royal prerogative, is not under the coercive power of the law [v]; which will not ſuppoſe him capable of committing a folly, much leſs a crime. We are therefore, out of reverence and decency, to forbear any idle inquiries, of what would be the conſequence if the king were to act thus and thus: ſince the law deems ſo highly of his wiſdom and virtue, as not even to preſume it poſſible for him to do any thing inconſiſtent with his ſtation and dignity; and therefore has made no proviſion to remedy ſuch a grievance. But of this ſufficient was ſaid in a former volume [w], to which I muſt refer the reader.

[v] 1 Hal. P. C. 44. [w] Book I. ch. 7. pag. 244.

CHAPTER THE THIRD.

OF PRINCIPALS AND ACCESSORIES.

IT having been ſhewn in the preceding chapter what perſons are, or are not, upon account of their ſituation and circumſtances, capable of committing crimes, we are next to make a few remarks on the different degrees of guilt among perſons that are capable of offending; *viz.* as *principal*, and as *acceſſory*.

I. A MAN may be *principal* in an offence in two degrees. A principal, in the firſt degree, is he that is the actor, or abſolute perpetrator of the crime; and, in the ſecond degree, he is who is preſent, aiding, and abetting the fact to be done[a]. Which *preſence* need not always be an actual immediate ſtanding by, within ſight or hearing of the fact; but there may be alſo a conſtructive preſence, as when one commits a robbery or murder, and another keeps watch or guard at ſome convenient diſtance[b]. And this rule hath alſo other exceptions: for, in caſe of murder by poiſoning, a man may be a principal felon, by preparing and laying the poiſon, or perſuading another to drink it[c] who is ignorant of it's poiſonous quality[d], or giving it to him for that purpoſe; and yet not adminiſter it himſelf, nor be preſent when the very deed of poiſoning is committed[e]. And the ſame reaſoning will hold, with regard to other murders committed in the abſence

[a] 1 Hal. P. C. 615.
[b] Foſter. 350.
[c] Kel. 52.
[d] Foſter. 349.
[e] 3 Inſt. 138.

of the murderer, by means which he had prepared beforehand, and which probably could not fail of their miſchievous effect. As by laying a trap or pitfall for another, whereby he is killed; letting out a wild beaſt, with an intent to do miſchief; or exciting a madman to commit murder, ſo that death thereupon enſues: in every of theſe caſes the party offending is guilty of murder as a principal, in the firſt degree. For he cannot be called an acceſſory, that neceſſarily preſuppoſing a principal: and the poiſon, the pitfall, the beaſt, or the madman cannot be held principals, being only the inſtruments of death. As therefore he muſt be certainly guilty, either as principal or acceſſory, and cannot be ſo as acceſſory, it follows that he muſt be guilty as principal: and if principal, then in the firſt degree; for there is no other criminal, much leſs a ſuperior in the guilt, whom he could aid, abet, or aſſiſt[f].

II. AN *acceſſory* is he who is not the chief actor in the offence, nor preſent at it's performance, but is ſomeway concerned therein, either *before* or *after* the fact committed. In conſidering the nature of which degree of guilt, we will, firſt, examine, what offences admit of acceſſories, and what not: ſecondly, who may be an acceſſory *before* the fact: thirdly, who may be an acceſſory *after* it: and, laſtly, how acceſſories, conſidered merely as ſuch, and diſtinct from principals, are to be treated.

1. AND, firſt, as to what offences admit of acceſſories, and what not. In high treaſon there are no acceſſories, but all are principals: the ſame acts, that make a man acceſſory in felony, making him a principal in high treaſon, upon account of the heinouſneſs of the crime[g]. Beſides it is to be conſidered, that the bare intent to commit treaſon is many times actual treaſon; as imagining the death of the king, or conſpiring to take away his crown. And, as no one can adviſe and abet ſuch a crime without an intention to have it done, there can be no acceſſories before the fact; ſince the

[f] 1 Hal. P. C. 617. 2 Hawk. P. C. 315. [g] 3 Inſt. 138. 1 Hal. P. C. 613.

very

very advice and abetment amount to principal treaſon. But this will not hold in the inferior ſpecies of high treaſon, which do not amount to the legal idea of compaſſing the death of the king, queen, or prince. For in thoſe no advice to commit them, unleſs the thing be actually performed, will make a man a principal traitor[h]. In petit treaſon, murder, and felonies with or without benefit of clergy, there may be acceſſories: except only in thoſe offences, which by judgment of law are ſudden and unpremeditated, as manſlaughter and the like; which therefore cannot have any acceſſories *before* the fact[i]. So too in petit larceny, and in all crimes under the degree of felony, there are no acceſſories either *before* or *after* the fact; but all perſons concerned therein, if guilty at all, are principals[k]: the ſame rule holding with regard to the higheſt and loweſt offences; though upon different reaſons. In treaſon all are principals, *propter odium delicti*; in treſpaſs all are principals, becauſe the law, *quae de minimis non curat*, does not deſcend to diſtinguiſh the different ſhades of guilt in petty miſdemeſnors. It is a maxim, that *acceſſorius ſequitur naturam ſui principalis*[l]: and therefore an acceſſory cannot be guilty of a higher crime than his principal; being only puniſhed, as a partaker of his guilt. So that if a ſervant inſtigates a ſtranger to kill his maſter, this being murder in the ſtranger as principal, of courſe the ſervant is acceſſory only to the crime of murder; though, had he been preſent and aſſiſting, he would have been guilty as principal of petty treaſon, and the ſtranger of murder[m].

2. As to the ſecond point, who may be an acceſſory *before* the fact; ſir Matthew Hale[n] defines him to be one, who being abſent at the time of the crime committed, doth yet procure, counſel, or command another to commit a crime. Herein abſence is neceſſary to make him an acceſſory: for if ſuch procurer, or the like, be preſent, he is guilty of the crime as principal. If A then adviſes B to kill another, and

[h] Foſter. 342.
[i] 1 Hal. P. C. 615.
[k] *Ibid.* 613.
[l] 3 Inſt. 139.
[m] 2 Hawk. P. C. 315.
[n] 1 Hal. P. C. 615, 616.

B does it in the absence of A, now B is principal. and A is accessory in the murder. And this holds, even though the party killed be not *in rerum naturâ* at the time of the advice given. As if A, the reputed father, advises B the mother of a bastard child, unborn, to strangle it when born, and she does so; A is accessory to this murder[o]. And it is also settled[p], that whoever procureth a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact. It is likewise a rule, that he who in any wise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act; but is not accessory to any act distinct from the other. As if A commands B to beat C, and B beats him so that he dies; B is guilty of murder as principal, and A as accessory. But if A commands B to burn C's house; and he, in so doing, commits a robbery; now A, though accessory to the burning, is not accessory to the robbery, for that is a thing of a distinct and unconsequential nature[q]. But if the felony committed be the same in substance with that which is commanded, and only varying in some circumstantial matters; as if, upon a command to poison Titius, he is stabbed or shot, and dies; the commander is still accessory to the murder, for the substance of the thing commanded was the death of Titius, and the manner of it's execution is a mere collateral circumstance[r].

3. AN accessory *after* the fact may be, where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon[s]. Therefore, to make an accessory *ex post facto*, it is in the first place requisite that he knows of the felony committed[t]. In the next place he must receive, relieve, comfort, or assist him. And, generally, any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the assistor an accessory. As furnishing him with a horse to escape his

[o] Dyer. 186.
[p] Foster. 125.
[q] 1 Hal. P. C. 617.
[r] 2 Hawk. P. C. 316.
[s] 1 Hal. P. C. 618.
[t] 2 Hawk. P. C. 319.

pursuers,

purſuers, money or victuals to ſupport him, a houſe or other ſhelter to conceal him, or open force and violence to reſcue or protect him [t]. So likewiſe to convey inſtruments to a felon to enable him to break gaol, or to bribe the gaoler to let him eſcape, makes a man an acceſſory to the felony. But to relieve a felon in gaol with cloaths or other neceſſaries, is no offence: for the crime imputable to this ſpecies of acceſſory is the hindrance of public juſtice, by aſſiſting the felon to eſcape the vengeance of the law [v]. To buy or receive ſtolen goods, knowing them to be ſtolen, falls under none of theſe deſcriptions; it was therefore at common law, a mere miſdemeſnor, and made not the receiver acceſſory to the theft, becauſe he received the *goods* only, and not the *felon* [w]: but now by the ſtatutes 5 Ann. c. 31. and 4 Geo. I. c. 11, all ſuch receivers are made acceſſories (where the principal felony admits of acceſſories [x]), and may be tranſported for fourteen years (1); and, in the caſe of receiving linen goods ſtolen from the bleaching-grounds, are by ſtatute 18 Geo. II. c. 27. declared felons without benefit of clergy. In France ſuch receivers are puniſhed with death: and the Gothic conſtitutions diſtinguiſhed alſo three ſorts of thieves, "*rerum qui "conſilium daret, alterum qui contrectaret, tertium qui recep-* "*taret et occuleret; pari poenae ſingulos obnoxios* [y]."

THE felony muſt be complete at the time of the aſſiſtance given; elſe it makes not the aſſiſtant an acceſſory. As if one wounds another mortally, and after the wound given, but before death enſues, a perſon aſſiſts or receives the delinquent: this does not make him acceſſory to the homicide; for, till death enſues, there is no felony committed [z]. But ſo ſtrict is the law where a felony is actually complete, in order to do effectual juſtice, that the neareſt relations are not ſuffered to aid or receive one another. If the parent aſſiſts his child, or

[t] 2 Hawk. P. C. 317, 318.
[v] 1 Hal. P. C. 620, 621.
[w] *Ibid.* 620.
[x] Foſter. 73.
[y] Stiernhook *de jure Goth. l.* 3. *c.* 5.
[z] 2 Hawk. P. C. 320.

(1) See more upon this ſubject in p. 132.

the child the parent, if the brother receives the brother, the maſter his ſervant, or the ſervant his maſter, or even if the huſband relieves his wife, who have any of them committed a felony, the receivers become acceſſories *ex poſt facto*[a]. But a feme covert cannot become an acceſſory by the receipt and concealment of her huſband; for ſhe is preſumed to act under his coercion, and therefore ſhe is not bound, neither ought ſhe, to diſcover her lord. [39]

4. THE laſt point of enquiry is, how acceſſories are to be treated, conſidered diſtinct from principals. And the general rule of the antient law (borrowed from the Gothic conſtitutions[b]) is this, that acceſſories ſhall ſuffer the ſame puniſhment as their principals: if one be liable to death, the other is alſo liable[c]: as, by the laws of Athens, delinquents and their abettors were to receive the ſame puniſhment[d]. Why then, it may be aſked, are ſuch elaborate diſtinctions made between acceſſories and principals, if both are to ſuffer the ſame puniſhment? For theſe reaſons. 1. To diſtinguiſh the nature and denomination of crimes, that the accuſed may know how to defend himſelf when indicted: the commiſſion of an actual robbery being quite a different accuſation from that of harbouring the robber. 2. Becauſe, though by the antient common law the rule is as before laid down, that both ſhall be puniſhed alike, yet now by the ſtatutes relating to the benefit of clergy a diſtinction is made between them: acceſſories *after* the fact being ſtill allowed the benefit of clergy in all caſes, except horſe-ſtealing[e] and ſtealing of linen from bleaching-grounds[f]: which is denied to the principals, and acceſſories *before* the fact, in many caſes; as, among others, in petit treaſon, murder, robbery, and wilful burning[g]. And perhaps if a diſtinction were conſtantly to be made between the puniſhment of principals and acceſſories, even *before* the fact, the latter to be treated with a

[a] 3 Inſt. 107. 2 Hawk. P. C. 320.
[b] 1 Hal. P. C. 621.
[b] See Stiernhook, *ibid.*
[c] 3 Inſt. 138.
[d] Pott. Antiq. b. 1. c. 26.
[e] Stat. 31 Eliz. c. 12.
[f] Stat. 18 Geo. II. c. 27.
[g] 1 Hal. P. C. 615.

little

little leſs ſeverity than the former, it might prevent the perpetration of many crimes, by increaſing the difficulty of finding a perſon to execute the deed itſelf; as his danger would be greater than that of his accomplices, by reaſon of the difference of his puniſhment [b]. [40] 3. Becauſe formerly no man could be tried as acceſſory, till after the principal was convicted, or at leaſt he muſt have been tried at the ſame time with him: though that law is now much altered, as will be ſhewn more fully in it's proper place. 4. Becauſe, though a man be indicted as acceſſory and acquitted, he may afterwards be indicted as principal: for an acquittal of receiving or counſelling a felon is no acquittal of the felony itſelf: but it is matter of ſome doubt, whether, if a man be acquitted as principal, he can be afterwards indicted as acceſſory before the fact; ſince thoſe offences are frequently very near allied, and therefore an acquittal of the guilt of one may be an acquittal of the other alſo [l]. But it is clearly held, that one acquitted as principal may be indicted as an acceſſory *after* the fact; ſince that is always an offence of a different ſpecies of guilt, principally tending to evade the public juſtice, and is ſubſequent in it's commencement to the other. Upon theſe reaſons the diſtinction of principal and acceſſory will appear to be highly neceſſary; though the puniſhment is ſtill much the ſame with regard to principals, and ſuch acceſſories as offend *before* the fact is committed.

[b] Beccar. c. 37. [l] 1 Hal. P. C. 625, 626. 2 Hawk. P. C. 373. Foſter. 361.

CHAPTER THE FOURTH.

OF OFFENCES AGAINST GOD AND RELIGION.

IN the preſent chapter we are to enter upon the detail of the ſeveral ſpecies of crimes and miſdemeſnors, with the puniſhments annexed to each by the laws of England. It was obſerved in the beginning of this book[a], that crimes and miſdemeſnors are a breach and violation of the public rights and duties, owing to the whole community, conſidered as a community, in it's ſocial aggregate capacity. And in the very entrance of theſe commentaries[b] it was ſhewn, that human laws can have no concern with any but ſocial and relative duties; being intended only to regulate the conduct of man, conſidered under various relations, as a member of civil ſociety. All crimes ought therefore to be eſtimated merely according to the miſchiefs which they produce in civil ſociety[c]: and, of conſequence, private vices, or breach of mere abſolute duties, which man is bound to perform conſidered only as an individual, are not, cannot be, the object of any municipal law; any farther than as by their evil example, or other pernicious effects, they may prejudice the community, and thereby become a ſpecies of public crimes. Thus the vice of drunkenneſs, if committed privately and alone, is beyond the knowlege and of courſe beyond the reach of human tribunals: but if committed publicly, in the face of the world, it's evil example makes it liable to temporal cenſures. The vice of lying, which conſiſts (abſtractedly taken) in a criminal violation of truth, and therefore in any

[a] See pag. 5. [b] See Vol. I. pag. 123, 124. [c] Beccar. ch. 8.

ſhape

ſhape is derogatory from ſound morality, is not however taken notice of by our law, unleſs it carries with it ſome public inconvenience, as ſpreading falſe news; or ſome ſocial injury, as ſlander and malicious proſecution, for which a private recompence is given. And yet drunkenneſs and malevolent lying are *in foro conſcientiae* as thoroughly criminal when they are not, as when they are, attended with public inconvenience. The only difference is, that both public and private vices are ſubject to the vengeance of eternal juſtice; and public vices are beſides liable to the temporal puniſhments of human tribunals.

ON the other hand, there are ſome miſdemeſnors, which are puniſhed by the municipal law, that have in themſelves nothing criminal, but are made unlawful by the poſitive conſtitutions of the ſtate for public convenience. Such as poaching, exportation of wool, and the like. Theſe are naturally no offences at all; but their whole criminality conſiſts in their diſobedience to the ſupreme power, which has an undoubted right, for the well-being and peace of the community, to make ſome things unlawful, which are in themſelves indifferent. Upon the whole therefore, though part of the offences to be enumerated in the following ſheets are offences againſt the revealed law of God, others againſt the law of nature, and ſome are offences againſt neither; yet in a treatiſe of municipal law we muſt conſider them all as deriving their particular guilt, here puniſhable, from the law of man.

HAVING premiſed this caution, I ſhall next proceed to diſtribute the ſeveral offences, which are either directly or by conſequence injurious to civil ſociety, and therefore puniſhable by the laws of England, under the following general heads: firſt, thoſe which are more immediately injurious to God and his holy religion; ſecondly, ſuch as violate and tranſgreſs the law of nations; thirdly, ſuch as more eſpecially affect the ſovereign executive power of the ſtate, or the king and his government; fourthly, ſuch as more directly infringe

infringe the rights of the public or commonwealth; and, laſtly, ſuch as derogate from thoſe rights and duties, which are owing to particular individuals, and in the preſervation and vindication of which the community is deeply intereſted.

FIRST then, of ſuch crimes and miſdemeſnors, as more immediately offend Almighty God, by openly tranſgreſſing the precepts of religion either natural or revealed; and mediately by their bad example and conſequence, the law of ſociety alſo; which conſtitutes that guilt in the action, which human tribunals are to cenſure.

I. OF this ſpecies the firſt is that of *apoſtacy*, or a total renunciation of chriſtianity, by embracing either a falſe religion, or no religion at all. This offence can only take place in ſuch as have once profeſſed the true religion. The perverſion of a chriſtian to judaiſm, paganiſm, or other falſe religion, was puniſhed by the emperors Conſtantius and Julian with confiſcation of goods[a]; to which the emperors Theodoſius and Valentinian added capital puniſhment, in caſe the apoſtate endeavoured to pervert others to the ſame iniquity[b]. A puniſhment too ſevere for any temporal laws to inflict upon any ſpiritual offence: and yet the zeal of our anceſtors imported it into this country; for we find by Bracton[c], that in his time apoſtates were to be burnt to death. Doubtleſs the preſervation of chriſtianity, as a national religion, is, abſtracted from it's own intrinſic truth, of the utmoſt conſequence to the civil ſtate: which a ſingle inſtance will ſufficiently demonſtrate. The belief of a future ſtate of rewards and puniſhments, the entertaining juſt ideas of the moral attributes of the ſupreme being, and a firm perſuaſion that he ſuperintends and will finally compenſate every action in human life, (all which are clearly revealed in the doctrines, and forcibly inculcated by the precepts, of our ſaviour Chriſt,) theſe are the grand foundation of all judicial oaths; which call God to witneſs the truth of thoſe facts, which perhaps may be only known to him and the party atteſting: all moral evidence

[a] Cod. 1. 7. 1. [b] *Ibid.* 6. [c] *l.* 3. *c.* 9.

therefore,

therefore, all confidence in human veracity, muſt be weakened by apoſtacy, and overthrown by total infidelity [g]. Wherefore all affronts to chriſtianity, or endeavours to depreciate it's efficacy, in thoſe who have once profeſſed it, are highly deſerving of cenſure. But yet the loſs of life is a heavier penalty than the offence, taken in a civil light, deſerves: and, taken in a ſpiritual light, our laws have no juriſdiction over it. This puniſhment therefore has long ago become obſolete; and the offence of apoſtacy was for a long time the object only of the eccleſiaſtical courts, which corrected the offender *pro ſalute animae*. But about the cloſe of the laſt century, the civil liberties to which we were then reſtored being uſed as a cloke of maliciouſneſs, and the moſt horrid doctrines ſubverſive of all religion being publicly avowed both in diſcourſe and writings, it was thought neceſſary again for the civil power to interpoſe, by not admitting thoſe miſcreants [h] to the privileges of ſociety, who maintained ſuch principles as deſtroyed all moral obligation. To this end it was enacted by ſtatute 9 & 10 W. III. c. 32. that if any perſon educated in, or having made profeſſion of, the chriſtian religion, ſhall, by writing, printing, teaching, or adviſed ſpeaking, deny the chriſtian religion to be true, or the holy ſcriptures to be of divine authority, he ſhall upon the firſt offence be rendered incapable to hold any office or place of truſt; and, for the ſecond, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaſor of lands, and ſhall ſuffer three years impriſonment without bail. To give room however for repentance, if, within four months after the firſt conviction, the delinquent will in open court publicly renounce his error, he is diſcharged for that once from all diſabilities.

II. A SECOND offence is that of *hereſy*, which conſiſts not in a total denial of chriſtianity, but of ſome of it's eſſential

[g] *Utiles eſſe opiniones hat, quis negat, cum intelligat, quam multa firmentur jurejurando; quantae ſalutis ſint foederum religiones; quam multos divini ſupplicii metus a ſcelere revocarit; quamque ſancta ſit ſocietas civium inter ipſos, Dis immortalibus interpoſitis tum judicibus tum reſtibus? Cic. de LL. ii. 7.*

[h] *Miſcreyantes* in our antient law books is the name of unbelievers.

doctrines,

doctrines, publicly and obſtinately avowed; being defined by ſir Matthew Hale, "*ſententia rerum divinarum humano ſenſu ex-*
"*cogitata, palam dicta et pertinaciter defenſa*[i]." And here it muſt alſo be acknowleged that particular modes of belief or unbelief, not tending to overturn chriſtianity itſelf, or to ſap the foundations of morality, are by no means the object of coercion by the civil magiſtrate. What doctrines ſhall therefore be adjudged hereſy, was left by our old conſtitution to the determination of the eccleſiaſtical judge; who had herein moſt arbitrary latitude allowed him. For the general definition of an heretic given by Lyndewode[k], extends to the ſmalleſt deviations from the doctrines of holy church, "*haereticus eſt qui dubitat de fide catholica, et qui negligit ſervare*
"*ea, quae Romana eccleſia ſtatuit, ſeu ſervare decreverat.*" Or, as the ſtatute 2 Hen. IV. c. 15. expreſſes it in Engliſh, "teachers of erroneous opinions, contrary to the faith and "bleſſed determinations of the holy church." Very contrary this to the uſage of the firſt general councils, which defined all heretical doctrines with the utmoſt preciſion and exactneſs. And what ought to have alleviated the puniſhment, the uncertainty of the crime, ſeems to have enhanced it in thoſe days of blind zeal and pious cruelty. It is true that the ſanctimonious hypocriſy of the canoniſts went at firſt no farther than enjoining penance, excommunication, and eccleſiaſtical deprivation, for hereſy; though afterwards they proceeded boldly to impriſonment by the ordinary, and confiſcation of goods *in pios uſus*. But in the mean time they had prevailed upon the weakneſs of bigotted princes, to make the civil power ſubſervient to their purpoſes, by making hereſy not only a temporal, but even a capital offence: the Romiſh eccleſiaſtics determining, without appeal, whatever they pleaſed to be hereſy, and ſhifting off to the ſecular arm the odium and drudgery of executions; with which they themſelves were too tender and delicate to intermeddle. Nay they pretended to intercede and pray, on behalf of the convicted heretic, *ut citra mortis periculum ſententia circa eum moderatur*[l]: well knowing at the ſame time that they were delivering the unhappy

[i] 1 Hal. P. C. 384. [k] *cap. de haereticis.* [l] *Decretal. l. 5. t. 40. c. 27.*

happy victim to certain death. Hence the capital punishments inflicted on the antient Donatists and Manichaeans by the emperors Theodosius and Justinian[m]: hence also the constitution of the emperor Frederic mentioned by Lyndewode[n], adjudging all persons without distinction to be burnt with fire, who were convicted of heresy by the ecclesiastical judge. The same emperor, in another constitution[o], ordained that if any temporal lord, when admonished by the church, should neglect to clear his territories of heretics within a year, it should be lawful for good catholics to seize and occupy the lands, and utterly to exterminate the heretical possessors. And upon this foundation was built that arbitrary power, so long claimed and so fatally exerted by the pope, of disposing even of the kingdoms of refractory princes to more dutiful sons of the church. The immediate event of this constitution was something singular, and may serve to illustrate at once the gratitude of the holy see, and the just punishment of the royal bigot: for upon the authority of this very constitution, the pope afterwards expelled this very emperor Frederic from his kingdom of Sicily, and gave it to Charles of Anjou[p].

CHRISTIANITY being thus deformed by the dæmon of persecution upon the continent, we cannot expect that our own island should be entirely free from the same scourge. And therefore we find among our antient precedents[q] a writ *de haeretico comburendo*, which is thought by some to be as antient as the common law itself. However it appears from thence, that the conviction of heresy by the common law was not in any petty ecclesiastical court, but before the archbishop himself in a provincial synod; and that the delinquent was delivered over to the king to do as he should please with him: so that the crown had a control over the spiritual power, and might pardon the convict by issuing no process against him; the writ *de haeretico comburendo* being not a writ of course, but issuing only by the special direction of the king in council[r].

[m] *Cod.* l. 1. *tit.* 5.
[n] *c. de haereticis.*
[o] *Cod.* 1. 5. 4.
[p] Baldus *in Cod.* 1. 5. 4.
[q] F. N. B. 269.
[r] 1 Hal. P. C. 395.

BUT

But in the reign of Henry the fourth, when the eyes of the chriſtian world began to open, and the ſeeds of the proteſtant religion (though under the opprobrious name of lollardy [a]) took root in this kingdom; the clergy, taking advantage from the king's dubious title to demand an increaſe of their own power, obtained an act of parliament [b], which ſharpened the edge of perſecution to it's utmoſt keenneſs. For, by that ſtatute, the diocеſan alone, without the intervention of a ſynod, might convict of heretical tenets; and unleſs the convict abjured his opinions, or if after abjuration he relapſed, the ſheriff was bound *ex officio*, if required by the biſhop, to commit the unhappy victim to the flames, without waiting for the conſent of the crown. By the ſtatute 2 Hen. V. c. 7. lollardy was alſo made a temporal offence, and indictable in the king's courts; which did not thereby gain an excluſive, but only a concurrent juriſdiction with the biſhop's conſiſtory.

Afterwards, when the final reformation of religion began to advance, the power of the eccleſiaſtics was ſomewhat moderated: for though what hereſy is, was not then preciſely defined, yet we are told in ſome points what it is *not*: the ſtatute 25 Hen. VIII. c. 14. declaring, that offences againſt the ſee of Rome are not hereſy; and the ordinary being thereby reſtrained from proceeding in any caſe upon mere ſuſpicion; that is unleſs the party be accuſed by two credible witneſſes, or an indictment of hereſy be firſt previouſly found in the king's courts of common law. And yet the ſpirit of perſecution was not then abated, but only diverted into a lay channel. For in ſix years afterwards, by ſtatute 31 Hen. VIII. c. 14. the bloody law of the ſix articles was made, which eſtabliſhed the ſix moſt conteſted points of popery, tranſubſtantiation, communion in one kind, the celibacy of the clergy, monaſtic vows, the ſacrifice of the maſs, and auricular confeſſion; which points were "determined and reſolved by

[a] So called not from *lolium*, or tares (an etymology, which was afterwards deviſed in order to juſtify the burning of them; Matth. xiii. 30.) but from one Walter Lollhard, a German reformer, A. D. 1315. Mod. Un. Hiſt. xxvi. 13. Spelm. *Gloſſ.* 371.

[b] 2 Hen. IV. c. 15.

"the

"the moſt godly ſtudy, pain, and travail of his majeſty: for "which his moſt humble and obedient ſubjects, the lords "*ſpiritual* and temporal and the commons, in parliament "aſſembled, did not only render and give unto his highneſs "their moſt high and hearty thanks," but did alſo enact and declare all oppugners of the firſt to be heretics, and to be burnt with fire; and of the five laſt to be felons, and to ſuffer death. The ſame ſtatute eſtabliſhed a new and mixed juriſdiction of clergy and laity for the trial and conviction of heretics; the reigning prince being then equally intent on deſtroying the ſupremacy of the biſhops of Rome, and eſtabliſhing all other their corruptions of the chriſtian religion.

I SHALL not perplex this detail with the various repeals and revivals of theſe ſanguinary laws in the two ſucceeding reigns; but ſhall proceed directly to the reign of queen Elizabeth; when the reformation was finally eſtabliſhed with temper and decency, unſullied with party rancour, or perſonal caprice and reſentment. By ſtatute 1 Eliz. c. 1. all former ſtatutes relating to hereſy are repealed, which leaves the juriſdiction of hereſy as it ſtood at common law; *viz.* as to the infliction of common cenſures, in the eccleſiaſtical courts; and in caſe of burning the heretic, in the provincial ſynod only [v]. Sir Matthew Hale is indeed of a different opinion, and holds that ſuch power reſided in the dioceſan alſo, though he agrees, that in either caſe the writ *de haeretico comburendo* was not demandable of common right, but grantable or otherwiſe merely at the king's diſcretion [w]. But the principal point now gained was, that by this ſtatute a boundary is for the firſt time ſet to what ſhall be accounted hereſy; nothing for the future being to be ſo determined, but only ſuch tenets, which have been heretofore ſo declared, 1. By the words of the canonical ſcriptures; 2. By the firſt four general councils, or ſuch others as have only uſed the words of the holy ſcriptures; or, 3. Which ſhall hereafter be ſo declared by the parliament, with the aſſent of the clergy in convocation. Thus was hereſy reduced to a greater certainty than before; though it might not have been the worſe to have defined it in terms ſtill

[v] 5 Rep. 23. 12 Rep. 56. 92. [w] 1 Hal. P. C. 405.

more preciſe and particular: as a man continued ſtill liable
[49] to be burnt, for what perhaps he did not underſtand to be hereſy, till the eccleſiaſtical judge ſo interpreted the words of the canonical ſcriptures.

FOR the writ *de haeretico comburendo* remained ſtill in force; and we have inſtances of it's being put in execution upon two Anabaptiſts in the ſeventeenth of Elizabeth, and two Arians in the ninth of James the firſt. But it was totally aboliſhed, and hereſy again ſubjected only to eccleſiaſtical correction *pro ſalute animae*, by virtue of the ſtatute 29 Car. II. c. 9. For in one and the ſame reign, our lands were delivered from the ſlavery of military tenures; our bodies from arbitrary impriſonment by the *habeas corpus* act; and our minds from the tyranny of ſuperſtitious bigotry, by demoliſhing this laſt badge of perſecution in the Engliſh law.

IN what I have now ſaid I would not be underſtood to derogate from the juſt rights of the national church, or to favour a looſe latitude of propagating any crude undigeſted ſentiments in religious matters. Of propagating, I ſay; for the bare entertaining them, without an endeavour to diffuſe them, ſeems hardly cognizable by any human authority. I only mean to illuſtrate the excellence of our preſent eſtabliſhment, by looking back to former times. Every thing is now as it ſhould be, with reſpect to the ſpiritual cognizance, and ſpiritual puniſhment, of hereſy: unleſs perhaps that the crime ought to be more ſtrictly defined, and no proſecution permitted, even in the eccleſiaſtical courts, till the tenets in queſtion are by proper authority previouſly declared to be heretical. Under theſe reſtrictions, it ſeems neceſſary for the ſupport of the national religion, that the officers of the church ſhould have power to cenſure hereſies; yet not to haraſs them with temporal penalties, much leſs to exterminate or deſtroy them. The legiſlature hath indeed thought it proper, that the civil magiſtrate ſhould again interpoſe, with regard to one ſpecies of hereſy, very prevalent in modern times; for by ſtatute 9 & 10 W. III. c. 32. if any perſon educated in the

the christian religion, or professing the same, shall by writing, printing, teaching, or advised speaking, deny any one of the persons in the holy trinity to be God, or maintain that there are more Gods than one, he shall undergo the same [50] penalties and incapacities, which were just now mentioned to be inflicted on apostacy by the same statute. And thus much for the crime of heresy.

III. ANOTHER species of offences against religion are those which affect the *established church*. And these are either positive, or negative: positive, by reviling it's ordinances; or negative, by non-conformity to it's worship. Of both of these in their order.

1. AND, first, of the offence of *reviling the ordinances* of the church. This is a crime of a much grosser nature than the other of mere non-conformity; since it carries with it the utmost indecency, arrogance, and ingratitude: indecency, by setting up private judgment in virulent and factious opposition to public authority: arrogance, by treating with contempt and rudeness what has at least a better chance to be right than the singular notions of any particular man; and ingratitude, by denying that indulgence and undisturbed liberty of conscience to the members of the national church, which the retainers to every petty conventicle enjoy. However it is provided by statutes 1 Edw. VI. c. 1. and 1 Eliz. c. 1. that whoever reviles the sacrament of the lord's supper shall be punished by fine and imprisonment: and by the statute 1 Eliz. c. 2. if any minister shall speak any thing in derogation of the book of common prayer, he shall, if not beneficed, be imprisoned one year for the first offence, and for life for the second: and, if he be beneficed, he shall for the first offence be imprisoned six months, and forfeit a year's value of his benefice: for the second offence he shall be deprived, and suffer one year's imprisonment; and, for the third, shall in like manner be deprived, and suffer imprisonment for life. And if *any person* whatsoever shall in plays, songs, or other open words, speak any thing in derogation, depraving, or

deſpiſing of the ſaid book, or ſhall forcibly prevent the reading of it, or cauſe any other ſervice to be uſed in it's ſtead, he ſhall forfeit for the firſt offence an hundred marks; for the ſecond, four hundred; and for the third, ſhall forfeit all his goods and chattels, and ſuffer impriſonment for life. Theſe
[51] penalties were framed in the infancy of our preſent eſtabliſhment: when the diſciples of Rome and of Geneva united in inveighing with the utmoſt bitterneſs againſt the Engliſh liturgy: and the terror of theſe laws (for they ſeldom, if ever, were fully executed) proved a principal means, under providence, of preſerving the purity as well as decency of our national worſhip. Nor can their continuance to this time (of the milder penalties at leaſt) be thought too ſevere and intolerant; ſo far as they are levelled at the offence, not of *thinking* differently from the national church, but of *railing* at that church and *obſtructing* it's ordinances, for not ſubmitting it's public judgment to the private opinion of others. For, though it is clear that no reſtraint ſhould be laid upon rational and diſpaſſionate diſcuſſions of the rectitude and propriety of the eſtabliſhed mode of worſhip; yet contumely and contempt are what no eſtabliſhment can tolerate [v]. A rigid attachment to trifles, and an intemperate zeal for reforming them, are equally ridiculous and abſurd: but the latter is at preſent the leſs excuſable, becauſe from political reaſons, ſufficiently hinted at in a former volume [w], it would now be extremely unadviſable to make any alterations in the ſervice of the church; unleſs by it's own conſent, or unleſs it can be ſhewn that ſome manifeſt impiety or ſhocking abſurdity will follow from continuing the preſent forms.

2. NON-CONFORMITY to the worſhip of the church is the other, or negative branch of this offence. And for this there is much more to be pleaded than for the former; being a matter of private conſcience, to the ſcruples of which our preſent

[v] By an ordinance 23 Aug. 1645, which continued till the reſtoration, to preach, write, or print, any thing in derogation or depraving of the *directory*, for the then eſtabliſhed preſbyterian worſhip, ſubjected the offender upon indictment to a diſcretionary fine, not exceeding fifty pounds. (Scobell. 98)

[w] Vol. I. pag. 98.

laws

laws have ſhewn a very juſt and chriſtian indulgence. For undoubtedly all perſecution and oppreſſion of weak conſciences, on the ſcore of religious perſuaſions, are highly unjuſtifiable upon every principle of natural reaſon, civil liberty, or ſound religion. But care muſt be taken not to carry this indulgence into ſuch extremes, as may endanger the national church: there is always a difference to be made [52] between toleration and eſtabliſhment.

NON-CONFORMISTS are of two ſorts: firſt, ſuch as abſent themſelves from divine worſhip in the eſtabliſhed church, through total irreligion, and attend the ſervice of no other perſuaſion. Theſe by the ſtatutes of 1 Eliz. c. 2. 23 Eliz. c. 1. and 3 Jac. I. c. 4. forfeit one ſhilling to the poor every lord's day they ſo abſent themſelves, and 20 *l.* to the king if they continue ſuch default for a month together. And if they keep any inmate, thus irreligiouſly diſpoſed, in their houſes, they forfeit 10 *l. per* month.

THE ſecond ſpecies of non-conformiſts are thoſe who offend through a miſtaken or perverſe zeal. Such were eſteemed by our laws, enacted ſince the time of the reformation, to be papiſts and proteſtant diſſenters: both of which were ſuppoſed to be equally ſchiſmatics in not communicating with the national church; with this difference, that the papiſts divided from it upon material, though erroneous, reaſons; but many of the diſſenters upon matters of indifference, or, in other words, upon no reaſon at all. Yet certainly our anceſtors were miſtaken in their plans of compulſion and intolerance. The ſin of ſchiſm, as ſuch, is by no means the object of temporal coercion and puniſhment. If through weakneſs of intellect, through miſdirected piety, through perverſeneſs and acerbity of temper, or (which is often the caſe) through a proſpect of ſecular advantage in herding with a party, men quarrel with the eccleſiaſtical eſtabliſhment, the civil magiſtrate has nothing to do with it; unleſs their tenets and practice are ſuch as threaten ruin or diſturbance to the ſtate. He is bound indeed to protect the eſtabliſhed church:

and, if this can be better effected, by admitting none but it's genuine members to offices of truſt and emolument, he is certainly at liberty ſo to do; the diſpoſal of offices being matter of favour and diſcretion. But, this point being once ſecured, all perſecution for diverſity of opinions, however ridiculous or abſurd they may be, is contrary to every principle of ſound policy and civil freedom. The names and ſubordination of the clergy, the poſture of devotion, the materials and colour
[53] of the miniſter's garment, the joining in a known or an unknown form of prayer, and other matters of the ſame kind, muſt be left to the option of every man's private judgment.

WITH regard therefore to *proteſtant diſſenters*, although the experience of their turbulent diſpoſition in former times occaſioned ſeveral diſabilities and reſtrictions (which I ſhall not undertake to juſtify) to be laid upon them by abundance of ſtatutes [z], yet at length the legiſlature, with a ſpirit of true magnanimity, extended that indulgence to theſe ſectaries, which they themſelves, when in power, had held to be countenancing ſchiſm, and denied to the church of England [y]. The penalties are conditionally ſuſpended by the ſtatute 1 W. & M. ſt. 1. c. 18. "for exempting their majeſties' proteſtant "ſubjects, diſſenting from the church of England, from the "penalties of certain laws," commonly called the toleration act; which is confirmed by ſtatute 10 Ann. c. 2. and declares that neither the laws above-mentioned, nor the ſtatutes 1 Eliz. c. 2. § 14. 3 Jac. I. c. 4 & 5. nor any other penal laws made againſt popiſh recuſants (except the teſt acts) ſhall extend to any diſſenters, other than papiſts and ſuch as deny the trinity: provided, 1. that they take the oaths of allegiance and ſupremacy (or make a ſimilar affirmation, being quakers [z]) and ſubſcribe the declaration againſt popery; 2. that they repair to ſome congregation certified to and regiſtered in the court of the biſhop or archdeacon, or at the

[z] 23 Eliz. c. 1. 29 Eliz. c. 6. 3 Eliz. c. 1. 22 Car. II. c. 1.

[y] The ordinance of 1645 (before-cited) inflicted imprisonment for a year on the third offence, and pecuniary penalties on the former two, in caſe of uſing the book of common-prayer not only in a place of public worſhip, but alſo in any private family.

[z] See ſtat. 8 Geo. I. c. 6.

county

county ſeſſions; 3. that the doors of ſuch meeting-houſe ſhall be unlocked, unbarred, and unbolted; in default of which the perſons meeting there are ſtill liable to all the penalties of the former acts. Diſſenting teachers, in order to be exempted from the penalties of the ſtatutes 13 & 14 Car. II. c. 4. 15 Car. II. c. 6. 17 Car. II. c. 2. and 22 Car. II. c. 1. are alſo to ſubſcribe the articles of religion mentioned in the ſtatute 13 Eliz. c. 12. (which only concern the confeſſion of the true chriſtian faith, and the doctrine of the ſacraments) with an expreſs exception of thoſe relating to the government and powers of the church, and to infant baptiſm; or if they [54] ſcruple ſubſcribing the ſame, ſhall make and ſubſcribe the declaration preſcribed by ſtatute 19 Geo. III. c. 44. profeſſing themſelves to be chriſtians and proteſtants, and that they believe the ſcriptures to contain the revealed will of God, and to be the rule of doctrine and practice. Thus, though the crime of non-conformity is by no means univerſally abrogated, it is ſuſpended and ceaſes to exiſt with regard to theſe proteſtant diſſenters, during their compliance with the conditions impoſed by theſe acts: and, under theſe conditions, all perſons, who will approve themſelves no papiſts or oppugners of the trinity, are left at full liberty to act as their conſciences ſhall direct them, in the matter of religious worſhip. And if any perſon ſhall wilfully, maliciouſly, or contemptuouſly diſturb any congregation, aſſembled in any church or permitted meeting-houſe, or ſhall miſuſe any preacher or teacher there, he ſhall (by virtue of the ſame ſtatute 1 W. & M.) be bound over to the ſeſſions of the peace, and forfeit twenty pounds. But by ſtatute 5 Geo. 1. c. 4. no mayor or principal magiſtrate, muſt appear at any diſſenting meeting with the enſigns of his office [a], on pain of diſability to hold that or any other office: the legiſlature judging it a matter of propriety, that a mode of worſhip, ſet up in oppoſition to the national, when allowed to be exerciſed in peace, ſhould be exerciſed

[a] Sir Humphry Edwin, a lord mayor of London, had the imprudence ſoon after the toleration act to go to a preſbyterian meeting-houſe in his formalities; which is alluded to by dean Swift, in his *tale of a tub*, under the allegory of *Jack* getting on a great horſe, and eating cuſtard.

alſo with decency, gratitude, and humility. Diſſenters alſo, who ſubſcribe the declaration of the act 19 Geo. III. are exempted (unleſs in the caſe of endowed ſchools, and colleges) from the penalties of the ſtatutes 13 & 14 Car. II. c. 4. & 17 Car. II. c. 2. which prohibit (upon pain of fine and impriſonment) all perſons from teaching ſchool unleſs they be licenſed by the ordinary, and ſubſcribe a declaration of conformity to the liturgy of the church, and reverently frequent divine ſervice *eſtabliſhed* by the laws of this kingdom.

As to *papiſts*, what has been ſaid of the proteſtant diſſenters would hold equally ſtrong for a general toleration of them;
[55] provided their ſeparation was founded only upon difference of opinion in religion, and their principles did not alſo extend to a ſubverſion of the civil government. If once they could be brought to renounce the ſupremacy of the pope, they might quietly enjoy their ſeven ſacraments, their purgatory, and auricular confeſſion; their worſhip of reliques and images; nay even their tranſubſtantiation. But while they acknowlege a foreign power, ſuperior to the ſovereignty of the kingdom, they cannot complain if the laws of that kingdom will not treat them upon the footing of good ſubjects.

LET us therefore now take a view of the laws in force againſt the papiſts; who may be divided into three claſſes, perſons profeſſing popery, popiſh recuſants convict, and popiſh prieſts. 1. Perſons profeſſing the popiſh religion, beſides the former penalties for not frequenting their pariſh church, are diſabled from taking their lands either by deſcent or purchaſe, after eighteen years of age, until they renounce their errors; they muſt at the age of twenty-one regiſter their eſtates before acquired, and all future conveyances and wills relating to them; they are incapable of preſenting to any advowſon, or granting to any other perſon any avoidance of the ſame; they may not keep or teach any ſchool under pain of perpetual impriſonment; and, if they willingly ſay or hear maſs, they forfeit the one two hundred, the other one hundred marks, and each ſhall ſuffer a year's impriſonment. Thus much for perſons, who, from the misfortune of family prejudices or otherwiſe,

wiſe, have conceived an unhappy attachment to the Romiſh church from their infancy, and publicly profeſs it's errors But if any evil induſtry is uſed to rivet theſe errors upon them, if any perſon ſends another abroad to be educated in the popiſh religion, or to reſide in any religious houſe abroad for that purpoſe, or contributes to their maintenance when there; both the ſender, the ſent, and the contributor, are diſabled to ſue in law or equity, to be executor or adminiſtrator to any perſon, to take any legacy or deed of gift, and to bear any office in the realm, and ſhall forfeit all their goods and chattels, and likewiſe all their real eſtate for life. And where theſe errors are alſo aggravated by apoſtacy, or perverſion, where a perſon is reconciled to the ſee of Rome, or procures others to be reconciled, the offence amounts to high treaſon. 2. Popiſh [56] recuſants, convicted in a court of law of not attending the ſervice of the church of England, are ſubject to the following diſabilities, penalties, and forfeitures, over and above thoſe before-mentioned. They are conſidered as perſons excommunicated; they can hold no office or employment; they muſt not keep arms in their houſes, but the ſame may be ſeized by the juſtices of the peace; they may not come within ten miles of London, on pain of 100 *l*; they can bring no action at law, or ſuit in equity; they are not permitted to travel above five miles from home, unleſs by licence, upon pain of forfeiting all their goods; and they may not come to court under pain of 100 *l*. No marriage or burial of ſuch recuſant, or baptiſm of his child, ſhall be had otherwiſe than by the miniſters of the church of England, under other ſevere penalties. A married woman, when recuſant, ſhall forfeit two thirds of her dower or jointure, may not be executrix or adminiſtratrix to her huſband, nor have any part of his goods; and during the coverture may be kept in priſon, unleſs her huſband redeems her at the rate of 10 *l*. a month, or the third part of all his lands. And laſtly, as a feme-covert recuſant may be impriſoned, ſo all others muſt, within three months after conviction, either ſubmit and renounce their errors, or, if required ſo to do by four juſtices, muſt abjure and renounce the realm: and if they do not depart, or if they return without the king's licence,

licence, they ſhall be guilty of felony, and ſuffer death as felons without benefit of clergy. There is alſo an inferior ſpecies of recuſancy, (refuſing to make the declaration againſt popery enjoined by ſtatute 30 Car. II. ſt. 2. when tendered by the proper magiſtrate) which, if the party reſides within ten miles of London, makes him an abſolute recuſant convict; or, if at a greater diſtance, ſuſpends him from having any ſeat in parliament, keeping arms in his houſe, or any horſe above the value of five pounds. This is the ſtate, by the laws now in being[b], of a lay papiſt. But, 3. The remaining ſpecies or de-
[57] gree, *viz.* popiſh prieſts, are in a ſtill more dangerous condition. For by ſtatute 11 and 12 W. III. c. 4. popiſh prieſts or biſhops, celebrating maſs or exerciſing any part of their functions in England, except in the houſes of embaſſadors, are liable to perpetual impriſonment. And by the ſtatute 27 Eliz. c. 2. any popiſh prieſt, born in the dominions of the crown of England, who ſhall come over hither from beyond ſea, (unleſs driven by ſtreſs of weather and tarrying only a reaſonable time[c],) or ſhall be in England three days without conforming and taking the oaths, is guilty of high treaſon: and all perſons harbouring him are guilty of felony without the benefit of clergy.

THIS is a ſhort ſummary of the laws againſt the papiſts, under their three ſeveral claſſes, of perſons profeſſing the popiſh religion, popiſh recuſants convict, and popiſh prieſts. Of which the preſident Monteſquieu obſerves[d], that they are ſo rigorous, though not profeſſedly of the ſanguinary kind, that they do all the hurt that can poſſibly be done in cold blood. But in anſwer to this it may be obſerved, (what foreigners who only judge from our ſtatute book are not fully apprized of,) that theſe laws are ſeldom exerted to their utmoſt rigor: and indeed, if they were, it would be very difficult to excuſe them. For they are rather to be accounted for from their hiſtory, and the urgency of the times which produced

[b] Stat. 23 Eliz. c. 1. 27 Eliz. c. 2. 29 Eliz. c. 6. 35 Eliz. c. 2. 1 Jac. I. c. 4. 3 Jac. I. c. 4. & 5. 7 Jac. I. c. 6. 3 Car. I. c. 3. 25 Car. II. c. 2. 30 Car. II. ſt. 2. 1 W. & M. c. 9. 15. & 26. 11 & 12 W. III c. 4. 12 Ann. ſt. 2. c. 14. 1 Geo. I. ſt. 2. c. 55. 3 Geo. I. c. 18. 11 Geo. II. c. 17.

[c] Raym. 377. Latch. 1.

[d] Sp. L. b. 19. c. 27.

them,

them, than to be approved (upon a cool review) as a ſtanding ſyſtem of law. The reſtleſs machinations of the Jeſuits during the reign of Elizabeth, the turbulence and uneaſineſs of the papiſts under the new religious eſtabliſhment, and the boldneſs of their hopes and wiſhes for the ſucceſſion of the queen of Scots, obliged the parliament to counteract ſo dangerous a ſpirit by laws of a great, and then perhaps neceſſary, ſeverity. The powder-treaſon, in the ſucceeding reign, ſtruck a panic into James I. which operated in different ways: it occaſioned the enacting of new laws againſt the papiſts; but deterred him from putting them in execution. The intrigues of queen Henrietta in the reign of Charles I., the proſpect of a popiſh ſucceſſor in that of Charles II., the aſſaſſination-plot in the reign of King William, and the avowed claim of a popiſh pretender to the crown in that and ſubſequent reigns, will account for the extenſion of theſe penalties at thoſe ſeveral [58] periods of our hiſtory. But if a time ſhould ever arrive, and perhaps it is not very diſtant, when all fears of a pretender ſhall have vaniſhed, and the power and influence of the pope ſhall become feeble, ridiculous, and deſpicable, not only in England but in every kingdom of Europe; it probably would not then be amiſs to review and ſoften theſe rigorous edicts; at leaſt till the *civil* principles of the roman catholics called again upon the legiſlature to renew them: for it ought not to be left in the breaſt of every mercileſs bigot, to drag down the vengeance of theſe occaſional laws upon inoffenſive, though miſtaken ſubjects; in oppoſition to the lenient inclinations of the civil magiſtrate, and to the deſtruction of every principle of toleration and religious liberty.

THIS hath partly been done by ſtatute 18 Geo. III. c. 60. with regard to ſuch papiſts as duly take the oath therein preſcribed, of allegiance to his majeſty, abjuration of the pretender, renunciation of the pope's civil power, and abhorrence of the doctrines of deſtroying and not keeping faith with heretics, and depoſing or murdering princes excommunicated by authority of the ſee of Rome: in reſpect of whom only, the ſtatute of 11 & 12 W. III. is repealed, ſo far as it

disables them from purchasing or inheriting; or authorizes the apprehending or prosecuting the popish clergy, or subjects to perpetual imprisonment either them or any teachers of youth (1).

(1) But now by the statute 31 Geo. III. c. 32., which may be called the toleration act of the roman catholics, all the severe and cruel restrictions and penalties, enumerated by the learned Judge, are removed from those roman catholics, who are willing to comply with the requisitions of that statute, which are that they must appear at some of the courts of Westminster, or at the quarter-sessions held for the county, city, or place where they shall reside, and shall make and subscribe a declaration, that they profess the roman catholic religion, and also an oath which is exactly similar to that required by the 18 Geo. III. c. 60., the substance of which is stated above in the text. Of this declaration and oath being duly made by any roman catholic, the officer of the court shall grant him a certificate; and such officer shall yearly transmit to the privy council lists of all persons who have thus qualified themselves within the year in his respective court. The statute then provides, that a roman catholic, thus qualified, shall not be prosecuted under any statute for not repairing to a parish church, nor shall he be prosecuted for being a papist, nor for attending or performing mass or other ceremonies of the church of Rome; provided that no place shall be allowed for an assembly to celebrate such worship until it is certified to the sessions; nor shall any minister officiate in it, until his name and description are recorded there. And no such place of assembly shall have it's doors locked or barred during the time of meeting or divine worship.

And if any roman catholic whatever is elected constable, churchwarden, overseer, or into any parochial office, he may execute the same by a deputy, to be approved as if he were to act for himself as principal. But every minister, who has qualified, shall be exempt from serving upon juries, and from being elected into any parochial office. And all the laws for frequenting divine service on sundays, shall continue in force, except where persons attend some place of worship allowed by this statute, or the toleration act of the dissenters, 1 W. & M.

And if any person disturb a congregation allowed under this act, he shall, as for disturbing a dissenting meeting, be bound over to the

In order the better to ſecure the eſtabliſhed church againſt perils from non-conformiſts of all denominations, infidels, turks, jews, heretics, papiſts, and ſectaries, there are however

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the next ſeſſions, and upon conviction there, ſhall forfeit twenty pounds.

But no roman catholic miniſter ſhall officiate in any place of worſhip having a ſteeple and a bell, or at any funeral in a church or church-yard, or ſhall wear the habits of his order, except in a place allowed by this ſtatute, or in a private houſe, where there ſhall not be more than five perſons beſides the family. This ſtatute ſhall not exempt roman catholics from the payment of tithes, or other dues, to the church; nor ſhall it affect the ſtatutes concerning marriages, or any law reſpecting the ſucceſſion to the crown. No perſon, who has qualified, ſhall be proſecuted for inſtructing youth, except in an endowed ſchool, or a ſchool in one of the Engliſh univerſities; and except alſo, that no roman catholic ſchoolmaſter ſhall receive into his ſchool the child of any proteſtant father; nor ſhall any roman catholic keep a ſchool until his, or her, name be recorded as a teacher at the ſeſſions.

But no religious order is to be eſtabliſhed; and every endowment of a ſchool or college by a roman catholic ſhall ſtill be ſuperſtitious and unlawful. And no perſon henceforth ſhall be ſummoned to take the oath of ſupremacy, and the declaration againſt tranſubſtantiation. Nor ſhall roman catholics, who have qualified, be removable from London and Weſtminſter; neither ſhall any peer, who has qualified, be puniſhable for coming into the preſence, or palace, of the king or queen. And no papiſts whatever ſhall be any longer obliged to regiſter their names and eſtates, or enrol their deeds and wills. And every roman catholic, who has qualified, may be permitted to act as a barriſter, attorney, and notary.

The roman catholics cannot ſit in either houſe of parliament, becauſe every member of parliament muſt take the oath of ſupremacy, and repeat and ſubſcribe the declaration againſt tranſubſtantiation: ſee 1 vol. 162. Nor can they vote at elections for the members of the houſe of commons, becauſe before they vote, they muſt take the oath of ſupremacy. *Ibid.* 180.

The roman catholics in Ireland are permitted to vote at elections, but they cannot ſit in either houſe of parliament.

contumelious reproaches of our saviour Christ. Whither also may be referred all profane scoffing at the holy scripture, or exposing it to contempt and ridicule. These are offences punishable at common law by fine and imprisonment, or other infamous corporal punishment [a]: for christianity is part of the laws of England [b] (5).

V. Somewhat allied to this, though in an inferior degree, is the offence of profane and common *swearing* and
[60] *cursing*. By the last statute against which, 19 Geo. II. c. 21. which repeals all former ones, every labourer, sailor, or soldier profanely cursing or swearing shall forfeit 1 *s.* every other person under the degree of a gentleman 2 *s.* and every gentleman or person of superior rank 5 *s.* to the poor of the parish; and, on a second conviction, double; and, for every subsequent offence, treble the sum first forfeited; with all charges of conviction: and in default of payment shall be sent to the house of correction for ten days. Any justice of the peace may convict upon his own hearing, or the testimony of one witness; and any constable or peace officer, upon his own hearing, may secure any offender and carry him before a justice, and there convict him (6). If the justice omits his duty, he forfeits 5 *l.* and the constable 40 *s.* And the act is to be read in all parish churches, and public chapels, the sunday after every quarter day, on pain of 5 *l.* to be levied by warrant

[a] 1 Hawk. P. C. 7. [b] 1 Ventr. 293. 2 Strange 834.

(5) *Scripture est common ley, surquel touts maniares de leis sont fondues.* 34 *H. VI.* 40.

(6) The conviction must be within eight days after the offence, § 12. Each oath or curse being a distinct complete offence, there can be no question, I conceive, but a person may incur any number of penalties in one day, though Dr. Burn doubts whether any number of oaths or curses in one day amount to more than one offence. 3 *Burn.* 325.

Persons belonging to his majesty's navy, if guilty of profane cursing and swearing, are liable to suffer such punishment as a court martial shall think proper to inflict. 22 *Geo. II. c.* 33.

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from any juſtice. Beſides this puniſhment for taking God's name in vain in common diſcourſe, it is enacted by ſtatute 3 Jac. I. c. 21. that if in any ſtage play, interlude, or ſhew, the name of the holy trinity, or any of the perſons therein, be jeſtingly or profanely uſed, the offender ſhall forfeit 10*l.*; one moiety to the king, and the other to the informer.

VI. A SIXTH ſpecies of offences againſt God and religion, of which our antient books are full, is a crime of which one knows not well what account to give. I mean the offence of *witchcraft*, *conjuration*, *inchantment*, or *ſorcery*. To deny the poſſibility, nay, actual exiſtence of witchcraft and ſorcery, is at once flatly to contradict the revealed word of God, in various paſſages both of the old and new teſtament: and the thing itſelf is a truth to which every nation in the world hath in it's turn borne teſtimony; either by examples ſeemingly well atteſted, or by prohibitory laws; which at leaſt ſuppoſe the poſſibility of a commerce with evil ſpirits. The civil law puniſhes with death not only the ſorcerers themſelves, but alſo thoſe who conſult them[1]; imitating in the former the expreſs law of God[k], "thou ſhalt not ſuffer a witch to live." And our own laws, both before and ſince the conqueſt, have been equally penal; ranking this crime in the ſame claſs with hereſy, and condemning both to the flames[l]. The preſident [61] Monteſquieu[m] ranks them alſo both together, but with a very different view: laying it down as an important maxim, that we ought to be very circumſpect in the proſecution of magic and hereſy; becauſe the moſt unexceptionable conduct, the pureſt morals and the conſtant practice of every duty in life, are not a ſufficient ſecurity againſt the ſuſpicion of crimes like theſe. And indeed the ridiculous ſtories that are generally told, and the many impoſtures and deluſions that have been diſcovered in all ages, are enough to demoliſh all faith in ſuch a dubious crime; if the contrary evidence were not alſo extremely ſtrong. Wherefore it ſeems to be the moſt eligible way to conclude, with an ingenious writer of our own[n], that

[1] *Cod. l.* 9. *c.* 18.
[k] Exod. xxii. 18.
[l] 3 Inſt. 44.
[m] Sp. L. b. 12. c. 5.
[n] Mr. Addiſon, Spect. No. 117.

in general there has been ſuch a thing as witchcraft; though one cannot give credit to any particular modern inſtance of it.

OUR forefathers were ſtronger believers, when they enacted by ſtatute 33 Hen. VIII. c. 8. all witchcraft and ſorcery to be felony without benefit of clergy; and again by ſtatute 1 Jac. I. c. 12. that all perſons invoking any evil ſpirit, or conſulting, covenanting with, entertaining, employing, feeding, or rewarding any evil ſpirit; or taking up dead bodies from their graves to be uſed in any witchcraft, ſorcery, charm, or inchantment; or killing or otherwiſe hurting any perſon by ſuch infernal arts, ſhould be guilty of felony without benefit of clergy, and ſuffer death. And, if any perſon ſhould attempt by ſorcery to diſcover hidden treaſure, or to reſtore ſtolen goods, or to provoke unlawful love, or to hurt any man or beaſt, though the ſame were not effected, he or ſhe ſhould ſuffer impriſonment and pillory for the firſt offence, and death for the ſecond. Theſe acts continued in force till lately, to the terror of all ancient females in the kingdom: and many poor wretches were ſacrificed thereby to the prejudice of their neighbours, and their own illuſions; not a few having, by ſome means or other, confeſſed the fact at the gallows. But all executions for this dubious crime are now at an end; our legiſlature having at length followed the wiſe example of Louis XIV. in France, who thought proper by an edict to re-
[62] ſtrain the tribunals of juſtice from receiving informations of witchcraft*. And accordingly it is with us enacted by ſtatute 9 Geo. II. c. 5. that no proſecution ſhall for the future be carried on againſt any perſon for conjuration, witchcraft, ſorcery, or inchantment (7). But the miſdemeſnor of perſons pretend-

* Voltaire *Siecl. Louis xiv.* ch. 29. Mod. Un. Hiſt. xxv. 215. Yet Voughlans (*de droit criminel*, 353, 459.) ſtill reckons up ſorcery and witchcraft among the crimes puniſhable in France.

(7) In Ireland there is ſtill a ſtatute inflicting capital puniſhment upon witches, unrepealed. It was paſſed in the 28th Eliz. and it deſcribes every ſpecies of the crime as minutely as the Engliſh ſtatute 1 Jac. I. c. 12.; and it even provides for the trial of peers, who might happen to be charged with that crime. 1 *Ld. Mountm. Hiſt. Iriſh Parliament.*

ing to uſe witchcraft, tell fortunes, or diſcover ſtolen goods by ſkill in the occult ſciences, is ſtill deſervedly puniſhed with a year's impriſonment, and ſtanding four times in the pillory.

VII. A SEVENTH ſpecies of offenders in this claſs are all *religious impoſtors*: ſuch as falſly pretend an extraordinary commiſſion from heaven; or terrify and abuſe the people with falſe denunciations of judgments. Theſe, as tending to ſubvert all religion, by bringing it into ridicule and contempt, are puniſhable by the temporal courts with fine, impriſonment, and infamous corporal puniſhment[p].

VIII. SIMONY, or the corrupt preſentation of any one to an eccleſiaſtical benefice for gift or reward, is alſo to be conſidered as an offence againſt religion; as well by reaſon of the ſacredneſs of the charge which is thus profanely bought and ſold, as becauſe it is always attended with perjury in the perſon preſented[q]. The ſtatute 31 Eliz. c. 6. (which, ſo far as it relates to the forfeiture of the right of preſentation, was conſidered in a former book[r]) enacts, that if any patron, for money or any other corrupt conſideration or promiſe, directly or indirectly given, ſhall preſent, admit, inſtitute, induct, inſtall, or collate any perſon to an eccleſiaſtical benefice or dignity, both the giver and taker ſhall forfeit two years value of the benefice or dignity; one moiety to the king, and the other to any one who will ſue for the ſame. If perſons alſo corruptly reſign or exchange their benefices, both the giver and taker ſhall in like manner forfeit double the value of the money or other corrupt conſideration (8). And perſons who

[p] 1 Hawk. P. C. 7. [q] 3 Inſt. 156. [r] See Vol. II. p. 279.

(8) Any reſignation or exchange for money is corrupt, however apparently fair the tranſaction; as where a father wiſhing that his ſon in orders ſhould be employed in the duties of his profeſſion, agreed to ſecure, by a bond, the payment of an annuity exactly equal to the annual produce of a benefice, in conſideration of the incumbent's reſigning in favour of his ſon. The annuity being afterwards in arrear, the bond was put in ſuit, and the defendant pleaded the ſimoniacal reſignation in bar; and lord Mansfield and

ſhall corruptly ordain or licence any miniſter, or procure him to be ordained or licenced, (which is the true idea of ſimony,) ſhall incur a like forfeiture of forty pounds; and the miniſter
[63] himſelf of ten pounds, beſides an incapacity to hold any eccleſiaſtical preferment for ſeven years afterwards. Corrupt elections and reſignations in colleges, hoſpitals, and other eleemoſynary corporations, are alſo puniſhed by the ſame ſtatute with forfeiture of the double value, vacating the place or office, and a devolution of the right of election for that turn to the crown.

IX. PROFANATION of the Lord's day, vulgarly (but improperly) called *ſabbath-breaking*, is a ninth offence againſt God and religion, puniſhed by the municipal law of England. For, beſides the notorious indecency and ſcandal, of permitting any ſecular buſineſs to be publicly tranſacted on that day, in a country profeſſing chriſtianity, and the corruption of morals which uſually follows it's profanation, the keeping one day in ſeven holy, as a time of relaxation and refreſhment as well as for public worſhip, is of admirable ſervice to a ſtate, conſidered merely as a civil inſtitution. It humanizes by the help of converſation and ſociety the manners of the lower claſſes; which would otherwiſe degenerate into a ſordid ferocity and ſavage ſelfiſhneſs of ſpirit: it enables the induſtrious workman to purſue his occupation in the enſuing week with health and chearfulneſs: it imprints on the minds of the people that ſenſe of their duty to God, ſo neceſſary to make them good citizens; but which yet would be worn out and defaced by an unremitted continuance of labour, without any ſtated times of recalling them to the worſhip of their maker. And therefore the laws of king Athelſtan[a] forbad all merchandizing on the Lord's day, under very ſevere penalties. And by the ſtatute 27 Hen. VI. c. 5. no fair or market ſhall be held on the prin-

[a] c. 24.

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the court, though they declared that it was an unconſcientious defence, yet as the reſignation had been made for money, determined, that it was corrupt and ſimoniacal, and in conſequence that the bond was void. *Young* v. *Jones*, E. T. 1782.

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cipal feſtivals, good friday, or any ſunday, (except the four ſundays in harveſt,) on pain of forfeiting the goods expoſed to ſale. And, ſince by the ſtatute 1 Car. I. c. 1. no perſon ſhall aſſemble, out of their own pariſhes, for any ſport whatſoever upon this day; nor, in their pariſhes, ſhall uſe any bull or bear baiting, interludes, plays, or other *unlawful* exerciſes, or paſtimes; on pain that every offender ſhall pay 3*s.* 4*d.* to the poor. This ſtatute does not prohibit, but rather impliedly allows, any innocent recreation or amuſement, within their reſpective pariſhes, even on the Lord's day, after divine ſervice [64] is over. But by ſtatute 29 Car. II. c. 7. no perſon is allowed to *work* on the Lord's day, or uſe any boat or barge, or expoſe any goods to ſale; except meat in public houſes, milk at certain hours, and works of neceſſity or charity, on forfeiture of 5 *s.* Nor ſhall any drover, carrier, or the like, travel upon that day, under pain of twenty ſhillings (9).

(9) Goods expoſed to ſale upon a ſunday are forfeited to the uſe of the poor, except that one-third may be allowed the informer; but milk may be ſold before nine in the morning, and after four in the afternoon. 29 *Car. II. c.* 7. Mackarel alſo may be ſold on ſundays before and after divine ſervice. 10 & 11 *W. c.* 24.

Forty watermen are permitted to ply upon the Thames betwixt Vauxhall and Limehouſe on Sundays. 11 & 12 *W. c.* 21. Fifty carriages are allowed to travel on ſundays either laden or returning empty. 2 *Geo. III. c.* 15. Perſons exerciſing their calling on a ſunday are only ſubject to one penalty; for the whole is but one offence, or one act of exerciſing, though continued the whole day. *Cowp.* 640.

Bakers were permitted to dreſs dinners on a ſunday as a work of neceſſity. 5 *T. R.* 449. But by the 34 Geo. III. c. 61. every baker ſhall be ſubject to a penalty of 10 *s.* to the uſe of the poor for exerciſing his buſineſs in any manner as a baker, except that he may ſell bread between nine o'clock in the morning and one in the afternoon; and may alſo within that time bake meat, puddings, and pies for any perſon, who ſhall carry or ſend the ſame to be baked. The 21 Geo. III. c. 49. was paſſed to reſtrain an indecent practice, which had become very prevalent in London and Weſtminſter; it enacts, that if any houſe, room, or place is

X. DRUNKENNESS is alſo puniſhed by ſtatute 4 Jac. I. c. 5. with the forfeiture of 5*s.*; or the ſitting ſix hours in the ſtocks (10): by which time the ſtatute preſumes the offender will have regained his ſenſes, and not be liable to do miſchief to his neighbours. And there are many wholeſome ſtatutes, by way of prevention, chiefly paſſed in the ſame reign of king James I. which regulate the licenſing of ale-houſes, and puniſh perſons found tippling therein; or the maſter of ſuch houſes permitting them (11).

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opened upon a ſunday for any public entertainment, or for debating upon any ſubject whatever, to which perſons are admitted by money or tickets, the keeper of it ſhall forfeit 200*l.* to any perſon who will proſecute; the manager or preſident 100*l.* and the receiver of the money or tickets 50*l.*; and every perſon advertiſing, or printing an advertiſement of, ſuch a meeting, ſhall in like manner forfeit 50*l.* for every offence.

(10) *i. e.* If he is not able to pay the penalty of 5*s.*

(11) No licence ſhall be granted to any perſon to keep an alehouſe, but by two juſtices, at a public meeting of the magiſtrates of the county, diviſion, or place, in which the houſe is ſituated, and this muſt be done by the conſent of the majority preſent. The time and place of ſuch public meeting muſt be appointed by two of the magiſtrates at leaſt ten days previous to the meeting, which ſhall be held every year, either on the 1ſt of September, or within twenty days afterwards. The licence muſt be renewed every year; and no licence ſhall be originally granted to any one, unleſs he produce a certificate ſigned by the miniſter of the pariſh, and the majority of the churchwardens and overſeers; or a certificate ſigned by three or four reſpectable houſeholders, teſtifying that the perſon applying is a perſon of good character. 26 *Geo. II. c.* 31. 1 *Burr.* 556.

Where an alehouſe-keeper dies or removes, if his executor, adminiſtrator, aſſign, or the new tenant obtains ſuch a certificate within thirty days after the death, or removal, or entry into the empty houſe, and produces it to the magiſtrates at the next petty ſeſſions, they may, if they think proper, grant him a licence, until the next general licenſing day. And till the next petty ſeſſions, ſuch perſon is indemnified for keeping the houſe open as an ale-houſe,

XI. THE laſt offence which I ſhall mention, more immediately againſt religion and morality, and cognizable by the temporal courts, is that of open and notorious *lewdneſs*: either by frequenting houſes of ill fame, which is an indictable offence[t]; or by ſome groſsly ſcandalous and public indecency, for which the puniſhment is by fine and impriſonment[u] (12). In the year 1650, when the ruling power found it [65]

[t] Poph. 208. [u] 1 Siderf. 168.

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houſe, provided he obtains his certificate within the time limited, though he is afterwards refuſed a licence. 32 *Geo. III. c.* 59.

This ſtatute, 32 Geo. III. c. 59., ſeems to include, though not clearly expreſſed, ale-houſes within corporations. But by 26 Geo. II. c. 31., perſons not licenſed the year before, need not produce certificates; and the general meeting for granting licences need not be held in September. 3 *T. R.* 560. Every perſon licenſed muſt enter into a recognizance of 10 *l.*, with two ſureties in 5 *l.* each, for his good behaviour. And perſons ſelling ale without a licence, are ſubject to ſevere penalties. No perſon can ſell ſpirituous liquors or wine, by retail, under a licence from the commiſſioners of exciſe, without having alſo a licence to ſell ale from the juſtices. 5 *Geo. III. c.* 46. 32 *Geo. III. c.* 59. 3 *T. R.* 560.

Juſtices of the peace have an abſolute and uncontrolled power and diſcretion in granting and refuſing ale-licences; but if it ſhould appear from their own declarations, or the circumſtances of their conduct, that they have either refuſed or granted a licence from a partial or corrupt motive, they are puniſhable in the court of king's bench by information, or they may be proſecuted by indictment. 1 *Burr.* 556. 1 *T. R.* 692. See the laws reſpecting ale-houſes more fully ſtated in 1 *Burn*, tit. *Ale-houſe*.

(12) Many offences of the incontinent kind fall properly under the juriſdiction of the eccleſiaſtical court, and are appropriated to it. But except thoſe appropriated caſes, the court of king's bench is the *cuſtos morum* of the people, and has the ſuperintendency of offences *contra bonos mores*. 3 *Burr.* 1438. In that court a gentleman was fined 2000 marks and impriſoned for expoſing himſelf naked in a public ſtreet. 1 *Sid.* 168. And an information has been granted againſt a number of perſons concerned in aſſigning a young girl as an apprentice to a gentleman, under pretence of

for their intereſt to put on the ſemblance of a very extraordinary ſtrictneſs and purity of morals, not only inceſt and wilful adultery were made capital crimes; but alſo the repeated act of keeping a brothel, or committing fornication, were (upon a ſecond conviction) made felony without benefit of clergy[w]. But at the reſtoration, when men, from an abhorrence of the hypocriſy of the late times, fell into a contrary extreme of licentiouſneſs, it was not thought proper to renew a law of ſuch unfaſhionable rigour. And theſe offences have been ever ſince left to the feeble coercion of the ſpiritual court, according to the rules of the canon law; a law which has treated the offence of incontinence, nay even adultery itſelf, with a great degree of tenderneſs and lenity; owing perhaps to the conſtrained celibacy of it's firſt compilers. The temporal courts therefore take no cognizance of the crime of adultery, otherwiſe than as a private injury[x].

BUT, before we quit this ſubject, we muſt take notice of the temporal puniſhment for having *baſtard children*, conſidered in a criminal light; for with regard to the maintenance of ſuch illegitimate offſpring, which is a civil concern, we

[w] Scobell. 121. [x] See vol. III. pag. 139.

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learning muſic, but for the purpoſes of proſtitution. 3 *Burr.* 1438. There is alſo an inſtance of an information for a conſpiracy againſt a peer and ſeveral others for enticing away a young lady from her father's houſe, and procuring her ſeduction by the peer. The young lady was the ſiſter of his wife. That circumſtance was undoubtedly a great aggravation of the offence, yet it's exiſtence in the caſe was not neceſſary to give the court cognizance of the proſecution. 3 *St. Tr.* 519. In a caſe, where a huſband had formally aſſigned his wife over to another man, lord Hardwicke directed a proſecution for that tranſaction, as being notoriouſly and groſsly againſt public decency and good manners. 3 *Burr.* 1438. All ſuch acts of indecency and immorality are public miſdemeanours, and the offenders may be puniſhed either by an information granted by the court of king's bench, or by an indictment preferred before a grand jury at the aſſizes or quarter ſeſſions.

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have formerly ſpoken at large [7]. By the ſtatute 18 Eliz. c. 3, two juſtices may take order for the puniſhment of the mother and reputed father; but what that puniſhment ſhall be is not therein aſcertained; though the contemporary expoſition was, that a corporal puniſhment was intended [8]. By ſtatute 7 Jac. I, c. 4. a ſpecific puniſhment (viz. commitment to the houſe of correction) is inflicted on the woman only. But in both caſes, it ſeems that the penalty can only be inflicted, if the baſtard becomes chargeable to the pariſh; for otherwiſe the very maintenance of the child is conſidered as a degree of puniſhment. By the laſt mentioned ſtatute the juſtices may commit the mother to the houſe of correction, there to be puniſhed and ſet on work for one year; and, in caſe of a ſecond offence, till ſhe find ſureties never to offend again.

[7] See vol. I. pag. 458. [8] Dalt. juſt. ch. 11.

CHAPTER THE FIFTH.

OF OFFENCES AGAINST THE LAW OF NATIONS.

ACCORDING to the method marked out in the preceding chapter, we are next to conſider the offences more immediately repugnant to that univerſal law of ſociety, which regulates the mutual intercourſe between one ſtate and another; thoſe, I mean, which are particularly animadverted on, as ſuch, by the Engliſh law.

THE law of nations is a ſyſtem of rules, deducible by natural reaſon, and eſtabliſhed by univerſal conſent among the civilized inhabitants of the world [a]; in order to decide all diſputes to regulate all ceremonies and civilities, and to inſure the obſervance of juſtice and good faith, in that intercourſe which muſt frequently occur between two or more independent ſtates, and the individuals belonging to each [b]. This general law is founded upon this principle, that different nations ought in time of peace to do one another all the good they can; and in time of war, as little harm as poſſible, without prejudice to their own real intereſts [c]. And, as none of theſe ſtates will allow a ſuperiority in the other, therefore neither can dictate or preſcribe the rules of this law to the reſt; but ſuch rules muſt neceſſarily reſult from thoſe

[a] *Ff.* 1. 1. 9.
[b] See vol. I. pag. 43.
[c] Sp. L. b. 1. c. 7.

principles

principles of natural juſtice, in which all the learned of every nation agree; or they depend upon mutual compacts or treaties between the reſpective communities; in the conſtruction of which there is alſo no judge to reſort to, but the law of nature and reaſon, being the only one in which all the contracting parties are equally converſant, and to which they are equally ſubject.

IN arbitrary ſtates this law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power: but ſince in England no royal power can introduce a new law, or ſuſpend the execution of the old, therefore the law of nations (wherever any queſtion ariſes which is properly the object of it's juriſdiction) is here adopted in it's full extent by the common law, and is held to be a part of the law of the land. And thoſe acts of parliament, which have from time to time been made to enforce this univerſal law, or to facilitate the execution of it's deciſions, are not to be conſidered as introductive of any new rule, but merely as declaratory of the old fundamental conſtitutions of the kingdom; without which it muſt ceaſe to be a part of the civilized world. Thus in mercantile queſtions, ſuch as bills of exchange and the like; in all marine cauſes, relating to freight, average, demurrage, inſurances, bottomry, and others of a ſimilar nature; the law-merchant[d], which is a branch of the law of nations, is regularly and conſtantly adhered to. So too in all diſputes relating to prizes, to ſhipwrecks, to hoſtages, and ranſom bills, there is no other rule of deciſion but this great univerſal law, collected from hiſtory and uſage, and ſuch writers of all nations and languages as are generally approved and allowed of.

BUT, though in civil tranſactions and queſtions of property between the ſubjects of different ſtates, the law of nations has much ſcope and extent, as adopted by the law of England; yet the preſent branch of our inquiries will fall

[d] See vol. I. pag. 273.

within

within a narrow compaſs, as offences againſt the law of nations can rarely be the object of the criminal law of any particular ſtate. For offences againſt this law are principally incident to whole ſtates or nations; in which caſe recourſe can only be had to war; which is an appeal to the God of hoſts, to puniſh ſuch infractions of public faith, as are committed by one independent people againſt another: neither ſtate having any ſuperior juriſdiction to reſort to upon earth for juſtice. But where the individuals of any ſtate violate this general law, it is then the intereſt as well as duty of the government, under which they live, to animadvert upon them with a becoming ſeverity, that the peace of the world may be maintained. For in vain would nations in their collective capacity obſerve theſe univerſal rules, if private ſubjects were at liberty to break them at their own diſcretion, and involve the two ſtates in a war. It is therefore incumbent upon the nation injured, firſt to demand ſatisfaction and juſtice to be done on the offender, by the ſtate to which he belongs; and, if that be refuſed or neglected, the ſovereign then avows himſelf an accomplice or abettor of his ſubject's crime, and draws upon his community the calamities of foreign war.

THE principal offences againſt the law of nations, animadverted on as ſuch by the municipal laws of England, are of three kinds; 1. Violation of ſafe-conducts; 2. Infringement of the rights of embaſſadors; and, 3. Piracy.

I. As to the firſt, *violation* of *ſafe-conducts* or *paſſports*, expreſsly granted by the king or his embaſſadors[e] to the ſubjects of a foreign power in time of mutual war; or committing acts of hoſtilities againſt ſuch as are in amity, league, or truce with us, who are here under a general implied ſafe-conduct: theſe are breaches of the public faith, without the preſervation of which there can be no intercourſe or commerce between one nation and another: and ſuch offences may, according to the writers upon the law of nations, be a juſt ground of a national war: ſince it is not in the power of

[e] See vol. I. pag. 260.

the foreign prince to cauſe juſtice to be done to his ſubjects by the very individual delinquent, but he muſt require it of the whole community. And as during the continuance of any ſafe-conduct, either expreſs or implied, the foreigner is under the protection of the king and the law; and, more eſpecially, as it is one of the articles of *magna charta* [f], that foreign merchants ſhould be entitled to ſafe-conduct and ſecurity throughout the kingdom; there is no queſtion but that any violation of either the perſon or property of ſuch foreigner may be puniſhed by indictment in the name of the king, whoſe honour is more particularly engaged in ſupporting his own ſafe-conduct. And, when this malicious rapacity was not confined to private individuals, but broke out into general hoſtilities, by the ſtatute 2 Hen. V. ſt. 1. c. 6. breaking of truce and ſafe-conducts, or abetting and receiving the truce-breakers, was (in affirmance and ſupport of the law of nations) declared to be high treaſon againſt the crown and dignity of the king; and conſervators of truce and ſafe-conducts were appointed in every port, and empowered to hear and determine ſuch treaſons (when committed at ſea) according to the antient marine law then practiſed in the admiral's court; and, together with two men learned in the law of the land, to hear and determine according to that law the ſame treaſons, when committed within the body of any county. Which ſtatute, ſo far as it made theſe offences amount to treaſon, was ſuſpended by 14 Hen. VI. c. 8. and repealed by 20 Hen. VI. c. 11. but revived by 29 Hen. VI. c. 2. which gave the ſame powers to the lord chancellor, aſſociated with either of the chief juſtices, as belonged to the conſervators of truce and their acceſſors; and enacted that, notwithſtanding the party be convicted of treaſon, the injured ſtranger ſhould have reſtitution out of his effects, prior to any claim of the crown. And it is farther enacted by the ſtatute 31 Hen. VI. c. 4. that if any of the king's ſubjects attempt or offend, upon the ſea, or in any port within the king's obeyſance, againſt any ſtranger in amity, league, or truce, or under ſafe-conduct; and eſpecially by attaching

[f] 9 *Hen. III. c.* 30. See vol. I. pag. 259, &c.

his

his perſon, or ſpoiling him or robbing him of his goods; the lord chancellor with any of the juſtices of either the king's-bench, or common pleas, may cauſe full reſtitution and amends to be made to the party injured.

IT is to be obſerved, that the ſuſpending and repealing acts of 14 & 20 Hen. VI. and alſo the reviving act of 29 Hen. VI. were only temporary: ſo that it ſhould ſeem that after the expiration of them all, the ſtatute 2 Hen. V. continued in full force: but yet it is conſidered as extinct by the ſtatute 14 Edw. IV. c. 4. which revives and confirms all ſtatutes and ordinances, made before the acceſſion of the houſe of York, againſt breakers of amities, truces, leagues, and ſafe-conducts, with an expreſs exception to the ſtatute of 2 Hen. V. But (however that may be) I apprehend it was finally repealed by the general ſtatutes of Edward VI. and queen Mary, for aboliſhing new-created treaſons: though ſir Matthew Hale ſeems to queſtion it as to treaſons committed on the ſea[g]. But certainly the ſtatute of 31 Hen. VI. remains in full force to this day.

II. As to the rights of *embaſſadors*, which are alſo eſtabliſhed by the law of nations, and are therefore matter of univerſal concern, they have formerly been treated of at large[h]. It may here be ſufficient to remark, that the common law of England recognizes them in their full extent, by immediately ſtopping all legal proceſs, ſued out through the ignorance or raſhneſs of individuals, which may intrench upon the immunities of a foreign miniſter or any of his train. And, the more effectually to enforce the law of nations in this reſpect, when violated through wantonneſs or inſolence, it is declared by the ſtatute 7 Ann. c. 12. that all proceſs whereby the perſon of any embaſſador, or of his domeſtic or domeſtic ſervant, may be arreſted, or his goods diſtrained or ſeiſed, ſhall be utterly null and void; and that all perſons proſecuting, ſoliciting, or executing ſuch proceſs, being convicted by confeſſion or the oath of one witneſs, before the

[g] 1 Hal. P. C. 267.

[h] See Vol. I. pag. 253.

lord

lord chancellor and the chief juſtices, or any two of them, ſhall be deemed violators of the laws of nations, and diſturbers of the public repoſe; and ſhall ſuffer ſuch penalties and corporal puniſhment as the ſaid judges, or any two of them, ſhall think fit [i]. Thus, in caſes of extraordinary outrage, for which the law hath provided no ſpecial penalty, the legiſlature hath intruſted to the three principal judges of the kingdom an unlimited power of proportioning the puniſhment to the crime.

III. LASTLY, the crime of *piracy*, or robbery and depredation upon the high ſeas, is an offence againſt the univerſal law of ſociety; a pirate being, according to ſir Edward Coke [k], *haſtis humani generis*. As therefore he has renounced all the benefits of ſociety and government, and has reduced himſelf afreſh to the ſavage ſtate of nature, by declaring war againſt all mankind, all mankind muſt declare war againſt him: ſo that every community hath a right, by the rule of ſelf-defence, to inflict that puniſhment upon him, which every individual would in a ſtate of nature have been otherwiſe entitled to do, for any invaſion of his perſon or perſonal property.

BY the antient common law, piracy, if committed by a ſubject, was held to be a ſpecies of treaſon, being contrary to his natural allegiance; and by an alien to be felony only: but now, ſince the ſtatute of treaſons, 25 Edw. III. c. 2. it is held to be only felony in a ſubject [l]. Formerly it was only cognizable by the admiralty courts, which proceed by the rules of the civil law [m]. But, it being inconſiſtent with the liberties of the nation, that any man's life ſhould be taken away, unleſs by the judgment of his peers, or the common law of the land, the ſtatute 28 Hen. VIII. c. 15. eſtabliſhed a new juriſdiction for this purpoſe; which proceeds according to the courſe of the common law, and of which we ſhall ſay more hereafter.

[i] See the occaſion of making this ſtatute; Vol. I. pag. 255.
[k] 3 Inſt. 113.
[l] *Ibid.*
[m] 1 Hawk P. C. 98.

THE

THE offence of piracy, by common law, conſiſts in committing thoſe acts of robbery and depredation upon the high ſeas, which, if committed upon land, would have amounted to felony there [a]. But, by ſtatute, ſome other offences are made piracy alſo: as, by ſtatute 11 & 12 W. III. c. 7. if any natural born ſubject commits any act of hoſtility upon the high ſeas, againſt others of his majeſty's ſubjects, under colour of a commiſſion from any foreign power; this, though it would only be an act of war in an alien, ſhall be conſtrued piracy in a ſubject. And farther, any commander, or other ſeafaring perſon, betraying his truſt, and running away with any ſhip, boat, ordinance, ammunition, or goods; or yielding them up voluntarily to a pirate; or conſpiring to do theſe acts; or any perſon aſſaulting the commander of a veſſel to hinder him from fighting in defence of his ſhip, or confining him, or making or endeavouring to make a revolt on board; ſhall, for each of theſe offences, be adjudged a pirate, felon, and robber, and ſhall ſuffer death, whether he be principal, or merely acceſſory by ſetting forth ſuch pirates, or abetting them before the fact, or receiving or concealing them or their goods after it. And the ſtatute 4 Geo. I. c. 11. expreſsly excludes the principals from the benefit of clergy. By the ſtatute 8 Geo. I. c. 24. the trading with known pirates, or furniſhing them with ſtores or ammunition, or fitting out any veſſel for that purpoſe, or in any wiſe conſulting, combining, confederating, or correſponding with them; or the forcibly boarding any merchant veſſel, though without ſeiſing or carrying her off, and deſtroying or throwing any of the goods over board; ſhall be deemed piracy: and ſuch acceſſories to piracy as are deſcribed by the ſtatute of king William, are declared to be principal pirates, and all pirates convicted by virtue of this act are made felons without benefit of clergy. By the ſame ſtatutes alſo, (to encourage the defence of merchant veſſels againſt pirates,) the commanders or ſeamen wounded, and the widows of ſuch ſeamen as are ſlain, in any piratical engagement, ſhall be entitled to a bounty, to
[73] be divided among them, not exceeding one fiftieth part of

[a] 1 Hawk. P. C. 100.

the

the value of the cargo on board: and ſuch wounded ſeamen ſhall be entitled to the penſion of Greenwich hoſpital; which no other ſeamen are, except only ſuch as have ſerved in a ſhip of war. And if the commander ſhall behave cowardly, by not defending the ſhip, if ſhe carries guns or arms, or ſhall diſcharge the mariners from fighting, ſo that the ſhip falls into the hands of pirates, ſuch commander ſhall forfeit all his wages, and ſuffer ſix months impriſonment. Laſtly, by ſtatute 18 Geo. II. c. 30. any natural born ſubject, or denizen, who in time of war ſhall commit hoſtilities at ſea againſt any of his fellow-ſubjects, or ſhall aſſiſt an enemy on that element, is liable to be tried and convicted as a pirate.

THESE are the principal caſes, in which the ſtatute law of England interpoſes, to aid and enforce the law of nations, as a part of the common law: by inflicting an adequate puniſhment upon offences againſt that univerſal law, committed by private perſons. We ſhall proceed in the next chapter to conſider offences, which more immediately affect the ſovereign executive power of our own particular ſtate, or the king and government; which ſpecies of crimes branches itſelf into a much larger extent, than either of thoſe of which we have already treated.

CHAPTER THE SIXTH.

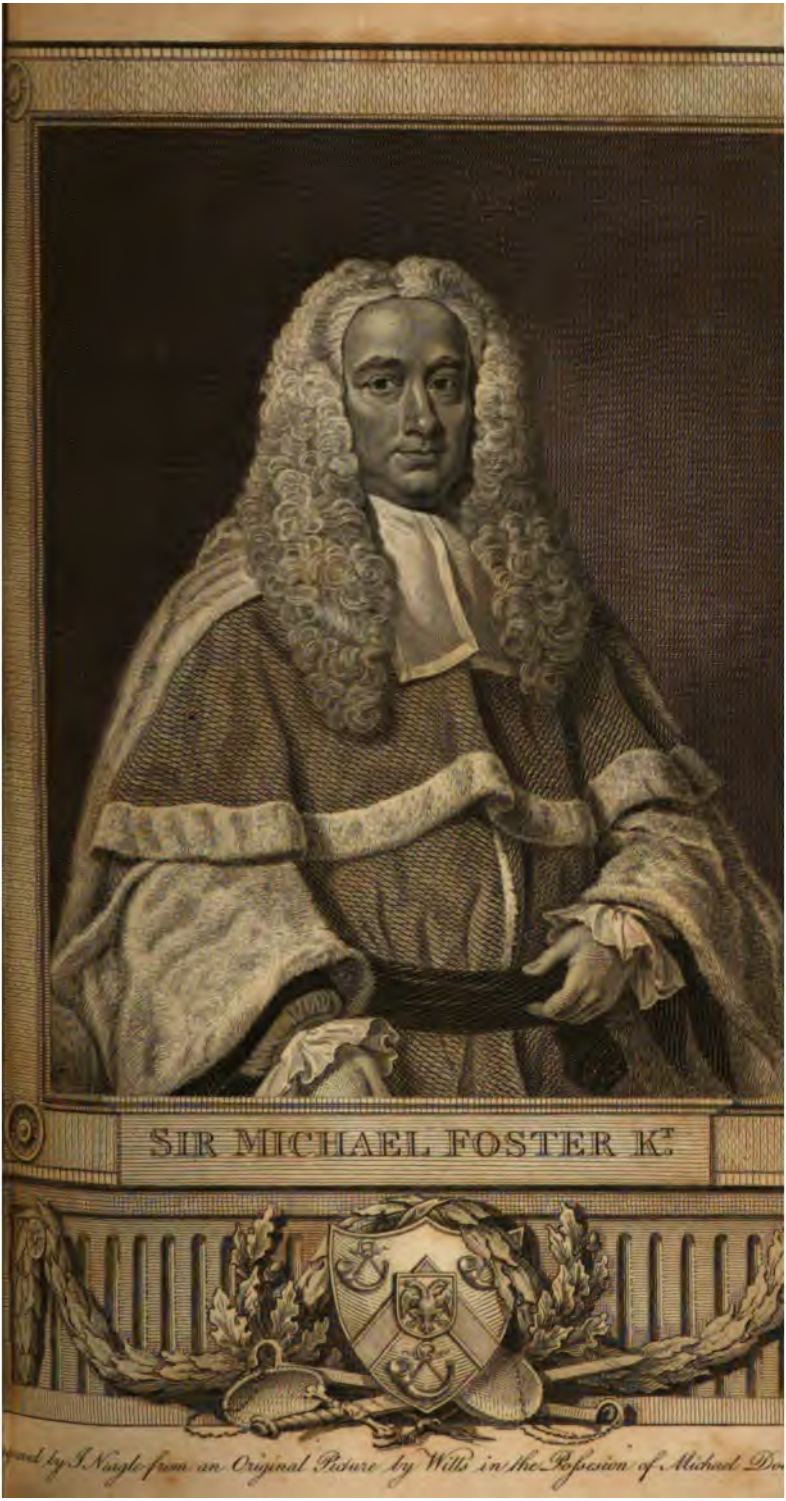
OF HIGH TREASON.

THE third general diviſion of crimes conſiſts of ſuch as more eſpecially affect the ſupreme executive power, or the king and his government; which amount either to a total renunciation of that allegiance, or at the leaſt to a criminal neglect of that duty, which is due from every ſubject to his ſovereign. In a former part of theſe commentaries[a] we had occaſion to mention the nature of allegiance, as the tie or *ligamen* which binds every ſubject to be true and faithful to his ſovereign *liege* lord the king, in return for that protection which is afforded him; and truth and faith to bear of life and limb, and earthly honour; and not to know or hear of any ill intended him, without defending him therefrom. And this allegiance, we may remember, was diſtinguiſhed into two ſpecies: the one natural and perpetual, which is inherent only in natives of the king's dominions; the other local and temporary, which is incident to aliens alſo. Every offence therefore more immediately affecting the royal perſon, his crown, or dignity, is in ſome degree a breach of this duty of allegiance, whether natural and innate, or local and acquired by reſidence: and theſe may be diſtinguiſhed into four kinds; 1. Treaſon. 2. Felonies injurious to the king's prerogative. 3. *Praemunire*. 4. Other miſpriſions and contempts. Of which crimes the firſt and principal is that of treaſon.

[75] TREASON, *proditio*, in it's very name (which is borrowed from the French) imports a betraying, treachery, or breach

[a] Book I. ch. 10.

of


SIR MICHAEL FOSTER Kt.
ed by J. Nagle from an Original Picture by Wills in the Possession of Michael Do

of faith. It therefore happens only between allies, ſaith the Mirror [b]: for treaſon is indeed a general appellation, made uſe of by the law, to denote not only offences againſt the king and government, but alſo that accumulation of guilt which ariſes whenever a ſuperior repoſes a confidence in a ſubject or inferior, between whom and himſelf there ſubſiſts a natural, a civil, or even a ſpiritual relation; and the inferior ſo abuſes that confidence, ſo forgets the obligations of duty, ſubjection, and allegiance, as to deſtroy the life of any ſuch ſuperior or lord [c]. This is looked upon as proceeding from the ſame principle of treachery in private life, as would have urged him who harbours it to have conſpired in public againſt his liege lord and ſovereign; and therefore for a wife to kill her lord or huſband, a ſervant his lord or maſter, and an eccleſiaſtic his lord or ordinary; theſe, being breaches of the lower allegiance, of private and domeſtic faith, are denominated *petit* treaſons. But when diſloyalty ſo rears it's creſt, as to attack even majeſty itſelf, it is called by way of eminent diſtinction *high* treaſon, *alta proditio*; being equivalent to the *crimen laeſae majeſtatis* of the Romans, as Glanvil [d] denominates it alſo in our Engliſh law.

As this is the higheſt civil crime, which (conſidered as a member of the community) any man can poſſibly commit, it ought therefore to be the moſt preciſely aſcertained. For if the crime of high treaſon be indeterminate, this alone (ſays the preſident Monteſquieu) is ſufficient to make any government degenerate into arbitrary power [e]. And yet, by the antient common law, there was a great latitude left in the breaſt of the judges, to determine what was treaſon, or not ſo: whereby the creatures of tyrannical princes had opportunity to create abundance of conſtructive treaſons; that is, to raiſe, by forced and arbitrary conſtructions, offences into the crime and puniſhment of treaſon, which never were ſuſ- [76] pected to be ſuch. Thus the *approaching*, or attempting to

[b] c. 1. § 7.
[c] *LL. Aelfredi.* c. 4. *Aethelſt.* c. 4. *Canuti.* c. 54 62.
[d] *l.* 1. *c.* 2.
[e] Sp. L. b. 12. c. 7.

exercise, royal power (a very uncertain charge) was in the 21 Edw. III. held to be treason in a knight of Hertfordshire, who forcibly assaulted and detained one of the king's subjects till he paid him 90 *l.*[f]: a crime, it must be owned, well deserving of punishment: but which seems to be of a complexion very different from that of treason. Killing the king's father, or brother, or even his messenger, has also fallen under the same denomination[g]. The latter of which is almost as tyrannical a doctrine as that of the imperial constitution of Arcadius and Honorius, which determines that any attempts or designs against the ministers of the prince shall be treason[h]. But however, to prevent the inconveniences which began to arise in England from this multitude of constructive treasons, the statute 25 Edw. III. c. 2. was made; which defines what offences only for the future should be held to be treason: in like manner as the *lex Julia majestatis* among the Romans, promulged by Augustus Caesar, comprehended all the antient laws, that had before been enacted to punish transgressors against the state[i]. This statute must therefore be our text and guide, in order to examine into the several species of high treason. And we shall find that it comprehends all kinds of high treason under seven distinct branches.

1. "WHEN a man doth compass or imagine the death of "our lord the king, of our lady his queen, or of their eldest "son and heir." Under this description it is held that a queen regnant (such as queen Elizabeth and queen Anne) is within the words of the act, being invested with royal power and entitled to the allegiance of her subjects[j]: but the husband of such a queen is not comprized within these words, [77] and therefore no treason can be committed against him[k]. The king here intended is the king in possession, without

[f] 1 Hal. P. C. 80.

[g] Brit. c. 22. 1 Hawk. P. C. 34.

[h] *Qui de nece virorum illustrium, qui cum filiis et consistorio nostro interfuit; senatorum etiam (nam et ipsi pars corporis nostri sunt) vel cujuslibet, postremo, qui militat nobiscum, cogitaverit: (eadem enim sevaritate voluntatem sceleris, qua effectum, puniri jura voluerint) ipse quidem, utpote majestatis reus, gladio feriatur, bonis ejus omnibus fisco nostro addictis.* (Cod. 9. 8. 5.)

[i] Gravin. *Orig.* 1. § 34.

[j] 1 Hal. P. C. 101.

[k] 3 Inst. 7. 1 Hal. P. C. 106.

any

any reſpect to his title: for it is held, that a king *de facto* and not *de jure*, or in other words an uſurper that hath got poſſeſſion of the throne, is a king within the meaning of the ſtatute; as there is a temporary allegiance due to him, for his adminiſtration of the government, and temporary protection of the public: and therefore treaſons committed againſt Henry VI. were puniſhed under Edward IV. though all the line of Lancaſter had been previouſly declared uſurpers by act of parliament. But the moſt rightful heir of the crown, or king *de jure* and not *de facto*, who hath never had plenary poſſeſſion of the throne, as was the caſe of the houſe of York during the three reigns of the line of Lancaſter, is not a king within this ſtatute againſt whom treaſons may be committed[l]. And a very ſenſible writer on the crown-law carries the point of poſſeſſion ſo far, that he holds[m], that a king out of poſſeſſion is ſo far from having any right to our allegiance, by any other title which he may ſet up againſt the king in being, that we are bound by the duty of our allegiance to reſiſt him. A doctrine which he grounds upon the ſtatute 11 Hen. VII. c. 1. which is declaratory of the common law, and pronounces all ſubjects excuſed from any penalty or forfeiture, which do aſſiſt and obey a king *de facto*. But in truth, this ſeems to be confounding all notions of right and wrong; and the conſequence would be, that when Cromwell had murdered the elder Charles, and uſurped the power (though not the name) of king, the people were bound in duty to hinder the ſon's reſtoration: and were the king of Poland or Morocco to invade this kingdom, and by any means to get poſſeſſion of the crown, (a term, by the way, of very looſe and indiſtinct ſignification,) the ſubject would be bound by his allegiance to fight for his natural prince to-day, and by the ſame duty of allegiance to fight againſt him to-morrow. The true diſtinction ſeems to be, that the ſtatute of Henry the ſeventh does by no means *command* any oppoſition to a [78] king *de jure*; but *excuſes* the obedience paid to a king *de facto*. When therefore a uſurper is in poſſeſſion, the ſubject is *excuſed* and *juſtified* in obeying and giving him aſ-

[l] 3 Inſt. 7. 1 Hal. P. C. 104. [m] 1 Hawk. P. C. 36.

ſiſtance: otherwiſe, under a uſurpation, no man could be ſafe; if the lawful prince had a right to hang him for obedience to the powers in being, as the uſurper would certainly do for diſobedience. Nay farther, as the maſs of people are imperfect judges of title, of which in all caſes poſſeſſion is *prima facie* evidence, the law compels no man to yield obedience to that prince, whoſe right is by want of poſſeſſion rendered uncertain and diſputable, till providence ſhall think fit to interpoſe in his favour, and decide the ambiguous claim: and therefore, till he is entitled to ſuch allegiance by poſſeſſion, no treaſon can be committed againſt him. Laſtly, a king who has reſigned his crown, ſuch reſignation being admitted and ratified in parliament, is according to ſir Matthew Hale no longer the object of treaſon [n]. And the ſame reaſon holds, in caſe a king abdicates the government; or, by actions ſubverſive of the conſtitution, virtually renounces the authority which he claims by that very conſtitution: ſince, as was formerly obſerved [o], when the fact of abdication is once eſtabliſhed, and determined by the proper judges, the conſequence neceſſarily follows, that the throne is thereby vacant, and he is no longer king.

LET us next ſee, what is a *compaſſing* or *imagining* the death of the king, &c. Theſe are ſynonymous terms; the word *compaſs* ſignifying the purpoſe or deſign of the mind or will [p], and not, as in common ſpeech, the carrying ſuch deſign to effect [q]. And therefore an accidental ſtroke, which may mortally wound the ſovereign, *per infortunium*, without any traiterous intent, is no treaſon: as was the caſe of ſir Walter Tyrrel, who, by the command of king William Rufus,
[79] ſhooting at a hart; the arrow glanced againſt a tree, and killed the king on the ſpot [r]. But, as this compaſſing or imagining is an act of the mind, it cannot poſſibly fall under any judicial cognizance, unleſs it be demonſtrated by

[n] 1 Hal. P. C. 104.

[o] Vol. I. pag. 212.

[p] By the antient law *compaſſing* or intending the death of any man, demonſtrated by ſome evident fact, was equally penal as homicide itſelf. (3 Inſt. 5.)

[q] 1 Hal. P. C. 107.

[r] 3 Inſt. 6.

ſome

ſome open, or *overt*, act (1). And yet the tyrant Dionyſius is recorded [s] to have executed a ſubject, barely for dreaming that he had killed him; which was held for ſufficient proof, that he had thought thereof in his waking hours. But ſuch is not the temper of the Engliſh law; and therefore in this, and the three next ſpecies of treaſon, it is neceſſary that there appear an open or *overt* act of a more full and expliſit nature, to convict the traitor upon. The ſtatute expreſsly requires, that the accuſed "be thereof upon ſufficient proof "attainted of ſome open act by men of his own condition." Thus, to provide weapons or ammunition for the purpoſe of killing the king, is held to be a palpable overt act of treaſon in imagining his death [t]. To conſpire to impriſon the king by force, and move towards it by aſſembling company, is an overt act of compaſſing the king's death [u]; for all force, uſed to the perſon of the king, in it's conſequence may tend to his death, and is a ſtrong preſumption of ſomething worſe intended than the preſent force, by ſuch as have ſo far thrown

[s] Plutarch. *in vit.* [t] 3 Inſt. 12. [u] 1 Hal. P. C. 109.

(1) In the caſe of the regicides, the indictment charged, that they did traiterouſly compaſs and imagine the death of the king. And the taking off his head was laid, among others, as an overt act of compaſſing. And the perſon who was ſuppoſed to have given the ſtroke was convicted on the ſame indictment.

For the compaſſing is conſidered as the treaſon, the overt acts as the means made uſe of to effectuate the intentions of the heart.

And in every indictment for this ſpecies of treaſon, and indeed for levying war, or adhering to the king's enemies, an overt act muſt be alleged and proved. For the overt act is the charge, to which the priſoner muſt apply his defence. But it is not neceſſary, that the whole of the evidence intended to be given ſhould be ſet forth; the common law never required this exactneſs, nor doth the ſtatute of King William require it. It is ſufficient, that the charge be reduced to a reaſonable certainty, ſo that the defendant may be apprized of the nature of it, and prepared to give an anſwer to it. *Foſt.* 194.

off their bounden duty to their ſovereign; it being an old obſervation, that there is generally but a ſhort interval between the priſons and the graves of princes. There is no queſtion alſo, but that taking any meaſures to render ſuch treaſonable purpoſes effectual, as aſſembling and conſulting on the means to kill the king, is a ſufficient overt act of high treaſon * (z).

* 1 Hawk. P. C. 38. 1 Hal. P. C. 119.

(a) This ſubject is ſo ably explained by Mr. J. Foſter in his firſt diſcourſe on high treaſon, that I think it may be uſeful to annex here two of his ſections.

In the caſe of the King the ſtatute of treaſons hath, with great propriety, retained the rule *voluntas pro facto*. The principle upon which this is founded is too obvious to need much enlargement. The king is conſidered as the head of the body-politic, and the members of that body are conſidered as united and kept together by a political union with him and with each other. His life cannot, in the ordinary courſe of things, be taken away by treaſonable practices without involving a whole nation in blood and confuſion; conſequently every ſtroke levelled at his perſon is, in the ordinary courſe of things, levelled at the public tranquillity. The law, therefore, tendereth the ſafety of the king with an anxious concern; and, if I may uſe the expreſſion, with a concern bordering upon jealouſy. It conſidereth the wicked imaginations of the heart in the ſame degree of guilt as if carried into actual execution from the moment meaſures appear to have been taken to render them effectual. And, therefore, if conſpirators meet and conſult how to kill the king, though they do not then fall upon any ſcheme for that purpoſe, this is an overt act of compaſſing his death; and ſo are all means made uſe of, be it advice, perſuaſion, or command, to incite or encourage others to commit the fact, or join in the attempt; and every perſon who but aſſenteth to any overtures for that purpoſe will be involved in the ſame guilt.

The care the law hath taken for the perſonal ſafety of the King is not confined to actions or attempts of the more flagitious kind, to aſſaſſination or poiſon, or other attempts directly and immediately aiming at his life. It is extended to every thing wilfully

How far mere *words*, ſpoken by an individual, and not relative to any treaſonable act or deſign then in agitation, ſhall amount to treaſon, has been formerly matter of doubt. We have two inſtances in the reign of Edward the fourth, of perſons executed for treaſonable words: the one a citizen [80] of London, who ſaid he would make his ſon heir of the *crown*, being the ſign of the houſe in which he lived; the other a gentleman, whoſe favourite buck the king killed in hunting, whereupon he wiſhed it, horns and all, in the king's belly(3). Theſe were eſteemed hard caſes: and the chief juſtice Markham rather choſe to leave his place than aſſent to the latter judgment [x]. But now it ſeems clearly to be agreed, that, by the common law and the ſtatute of Edward III. words ſpoken amount only to a high miſdemeſnor, and no treaſon. For they may be ſpoken in heat, without any intention, or be miſtaken, perverted, or miſ-remembered by the hearers; their meaning depends always on their connexion with other words, and things; they may ſignify differently even according to the tone of voice, with which they are de-

[x] 1 Hal. P. C. 115.

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wilfully and deliberately done or attempted, whereby his life may be endangered. And, therefore, the entering into meaſures for depoſing or impriſoning him, or to get his perſon into the power of the conſpirators, theſe offences are overt acts of treaſon within this breach of the ſtatute. For experience has ſhewn that between the priſons and the graves of princes the diſtance is very ſmall. *Foſt.* 194.

This was the ſpecies of treaſon with which the ſtate priſoners were charged, who were tried in 1794. And the queſtion, ſo ſtated by the court for the jury to try, was, Whether their meaſures had been entered into with an intent to ſubvert the monarchy and to depoſe the king? See *Hardy's* trial.

(3) There was even a refinement and degree of ſubtlety in the cruelty of that caſe, for he wiſhed it, horns and all, in the belly of him who counſelled the king to kill it; and as the king killed it of his own accord, or was his own counſeller, it was held to be a treaſonable wiſh againſt the king himſelf. 1 *Hal. P. C.* 115.

livered; and ſometimes ſilence itſelf is more expreſſive than any diſcourſe. As therefore there can be nothing more equivocal and ambiguous than words, it would indeed be unreaſonable to make them amount to high treaſon. And accordingly in 4 Car. I. on a reference to all the judges, concerning ſome very atrocious words ſpoken by one Pyne, they certified to the king, "that though the words were as wicked "as might be, yet they were no treaſon: for, unleſs it be "by ſome particular ſtatute, no words will be treaſon[y] (4)." If the words be ſet down in writing, it argues more deliberate intention; and it has been held that writing is an overt act of treaſon; for *ſcribere eſt agere*. But even in this caſe the bare words are not the treaſon, but the deliberate act of writing them. And ſuch writing, though unpubliſhed, has in ſome arbitrary reigns convicted it's author of treaſon: particularly in the caſes of one Peachum, a clergyman, for treaſonable paſſages in a ſermon never preached[z]; and of Algernon Sydney, for ſome papers found in his cloſet; which, had they been plainly relative to any previous formed deſign of dethroning or murdering the king, might doubtleſs have been properly read in evidence as overt
[81] acts of that treaſon, which was ſpecially laid in the indictment[a]. But being merely ſpeculative, without any intention (ſo far as appeared) of making any public uſe of them, the convicting the authors of treaſon upon ſuch an inſufficient foundation has been univerſally diſapproved. Peachum was therefore pardoned: and though Sydney indeed was executed,

[y] Cro. Car. 125. [z] *Ibid.* [a] Foſter. 198.

(4) This ſubject is fully and ably diſcuſſed by Mr. J. Foſter, who maintains that words alone cannot amount to an overt act of treaſon; but if they are attended or followed by a conſultation, meeting, or any act, then they will be evidence, or a confeſſion, of the intent of ſuch conſultation, meeting, or act; and he concludes, that "looſe words not relative to facts, are at the worſt no more "than bare indications of the malignity of the heart." *Foſt.* 202. *et ſeq.*

yet

yet it was to the general diſcontent of the nation; and his attainder was afterwards reverſed by parliament. There was then no manner of doubt, but that the publication of ſuch a treaſonable writing was a ſufficient overt act of treaſon at the common law [b]; though of late even that has been queſtioned.

2. THE ſecond ſpecies of treaſon is, "if a man do violate the king's companion, or the king's eldeſt daughter unmarried, or the wife of the king's eldeſt ſon and heir." By the king's companion is meant his wife; and by violation is underſtood carnal knowlege, as well without force, as with it: and this is high treaſon in both parties, if both be conſenting; as ſome of the wives of Henry the eighth by fatal experience evinced. The plain intention of this law is to guard the blood royal from any ſuſpicion of baſtardy, whereby the ſucceſſion to the crown might be rendered dubious: and therefore, when this reaſon ceaſes, the law ceaſes with it; for to violate a queen or princeſs dowager is held to be no treaſon [c] (5): in like manner as, by the feodal law, it was a felony and attended with a forfeiture of the fief, if the vaſal vitiated the wife or daughter of his lord [d]; but not ſo, if he only vitiated his widow [e].

3. THE third ſpecies of treaſon is, "if a man do levy war againſt our lord the king in his realm." And this

[b] 1 Hal. P.C. 118. 1 Hawk P.C. 38.
[c] 3 Inſt. 9.
[d] *Feud. l.* 1. *t.* 5.
[e] *Ibid. t.* 21.

(5) But the inſtances ſpecified in the ſtatute do not prove much conſiſtency in the application of this reaſon; for there is no protection given to the wives of the younger ſons of the king, though their iſſue muſt inherit the crown before the iſſue of the king's eldeſt daughter, and her chaſtity is only inviolable before marriage, whilſt her children would be clearly illegitimate.

Before the 25 Ed. III. it was held to be high treaſon not only to violate the wife and daughters of the king, but alſo the nurſes of his children, *les norices de lour enfantz*. *Britt. c.* 8.

may

may be done by taking arms, not only to dethrone the king, but under pretence to reform religion, or the laws, or to
[82] remove evil counſellors, or other grievances whether real or pretended[f] (6). For the law does not, neither can it, permit any private man, or ſet of men, to interfere forcibly in matters of ſuch high importance; eſpecially as it has eſtabliſhed a ſufficient power, for theſe purpoſes, in the high court of parliament: neither does the conſtitution juſtify any private or particular reſiſtance for private or particular grievances; though in caſes of national oppreſſion the nation has very juſtifiably riſen as one man, to vindicate the original contract ſubſiſting between the king and his people. To reſiſt the king's forces by defending a caſtle againſt them, is a levying of war: and ſo is an inſurrection with an avowed deſign to pull down *all* incloſures, *all* brothels, and the like; the univerſality of the deſign making it a rebellion againſt the ſtate, an uſurpation of the powers of government, and an inſolent invaſion of the king's authority[g]. But a tumult with a view to pull down a particular houſe, or lay open a particular incloſure, amounts at moſt to a riot; this being no general defiance of public government. So, if two ſubjects quarrel and levy war againſt each other, (in that ſpirit of private war, which prevailed all over Europe[h] in the early feodal times,) it is only a great riot and contempt, and no treaſon. Thus it happened between the earls of Hereford and Gloceſter in 20 Edw. I. who raiſed each a little army, and committed outrages upon each other's lands, burning houſes, attended with the loſs of many lives: yet this was held to be no high treaſon, but only a great miſdemeſnor[i]. A bare conſpiracy to levy war does not amount to this ſpecies of

[f] 1 Hawk. P. C. 37.
[g] 1 Hal. P. C. 132.
[h] Robertſon Cha. V. i. 45. 286.
[i] 1 Hal. P. C. 136.

(6) Lord Mansfield declared, upon the trial of lord George Gordon, that it was the unanimous opinion of the court, that an attempt, by intimidation and violence, to force the repeal of a law, was a levying war againſt the king, and high treaſon. *Doug.* 570.

treaſon;

treaſon; but (if particularly pointed at the perſon of the king or his government) it falls within the firſt, of compaſſing or imagining the king's death).

4. "IF a man be adherent to the king's enemies in his "realm, giving to them aid and comfort in the realm, or "elſewhere," he is alſo declared guilty of high treaſon. This muſt likewiſe be proved by ſome overt act, as by giving them intelligence (7), by ſending them proviſions, by ſelling them arms, by treacherouſly ſurrendering a fortreſs, or the like[k]. By enemies are here underſtood the ſubjects of foreign powers with whom we are at open war. As to foreign pirates or robbers, who may happen to invade our coaſts, without any open hoſtilities between their nation and our own, and without any commiſſion from any prince or ſtate at enmity with the crown of Great Britain, the giving them any aſſiſtance is alſo clearly treaſon; either in the light of adhering to the public enemies of the king and kingdom[l], or elſe in that of levying war againſt his majeſty. And, moſt indiſputably, the ſame acts of adherence or aid, which (when applied to foreign enemies) will conſtitute treaſon under this branch of the ſtatute, will (when afforded to our own fellow-ſubjects in actual rebellion at home) amount to high treaſon under the deſcription of levying war againſt the king[m]. But to relieve a rebel, fled out of the kingdom, is [83]

[j] 3 Inſt. 9. Foſter. 211. 213.
[k] 3 Inſt. 10.
[l] Foſter. 219.
[m] *Ibid.* 216.

(7) Sending intelligence to the enemy of the deſtinations and deſigns of this kingdom, in order to aſſiſt them in their operations againſt us, or in defence of themſelves, is high treaſon, although ſuch correſpondence ſhould be intercepted. Dr. Henſey's caſe, 1 *Burr.* 650.

The ſame doctrine was held by lord Kenyon and the court in the caſe of William Stone, who was tried at the bar of the court of king's bench in Hilary term 1796. In that caſe it was held, that ſending a paper to the enemy, though it was afterwards intercepted, containing advice not to invade this country, if ſent with the intention of aſſiſting their councils in their conduct and in the proſecution of the war, was high treaſon. 6 *T. R.* 527.

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no treaſon: for the ſtatute is taken ſtrictly, and a rebel is not an *enemy*; an enemy being always the ſubject of ſome foreign prince, and one who owes no allegiance to the crown of England [n]. And if a perſon be under circumſtances of actual force and conſtraint, through a well-grounded apprehenſion of injury to his life or perſon, this fear or compulſion will excuſe his even joining with either rebels or enemies *in* the kingdom, provided he leaves them whenever he hath a ſafe opportunity [o].

5. "IF a man counterfeit the king's great or privy ſeal," this is alſo high treaſon. But if a man takes wax bearing the impreſſion of the great ſeal off from one patent, and fixes it to another, this is held to be only an abuſe of the ſeal, and not a counterfeiting of it: as was the caſe of a certain chaplain, who in ſuch manner framed a diſpenſation for non-reſidence. But the knaviſh artifice of a lawyer much exceeded this of the divine. One of the clerks in chancery glewed together two pieces of parchment; on the uppermoſt of which he wrote a patent, to which he regularly obtained the great ſeal, the label going through both the ſkins. He
[84] then diſſolved the cement; and taking off the written patent, on the blank ſkin wrote a freſh patent, of a different import from the former, and publiſhed it as true. This was held no counterfeiting of the great ſeal, but only a great miſpriſion; and ſir Edward Coke [p] mentions it with ſome indignation, that the party was living at that day.

6. THE ſixth ſpecies of treaſon under this ſtatute, is "if "a man counterfeit the king's money; and if a man bring "falſe money into the realm counterfeit to the money of "England, knowing the money to be falſe, to merchan-"dize and make payment withal." As to the firſt branch, counterfeiting the king's money; this is treaſon, whether the falſe money be uttered in payment or not. Alſo if the king's own minters alter the ſtandard or alloy eſtabliſhed by law, it is treaſon. But gold and ſilver money only are held

[n] 1 Hawk. P. C. 38. [o] Foſter. 216. [p] 3 Inſt. 16.

to be within the ſtatute [q]. With regard likewiſe to the ſecond branch, importing foreign counterfeit money, in order to utter it here; it is held that uttering it, without importing it, is not within the ſtatute [r]. But of this we ſhall preſently ſay more.

7. THE laſt ſpecies of treaſon aſcertained by this ſtatute, is "if a man ſlay the chancellor, treaſurer, or the king's "juſtices of the one bench or the other, juſtices in eyre, or "juſtices of aſſiſe, and all other juſtices aſſigned to hear and "determine, being in their places doing their offices." Theſe high magiſtrates, as they repreſent the king's majeſty during the execution of their offices, are therefore for the time equally regarded by the law. But this ſtatute extends only to the actual killing of them, and not to wounding, or a bare attempt to kill them. It extends alſo only to the officers therein ſpecified; and therefore the barons of the exchequer, as ſuch, are not within the protection of this act [s]: but the lord keeper or commiſſioners of the great ſeal now ſeem to be within it, by virtue of the ſtatutes 5 Eliz. c. 18. and 1 W. & M. c. 21. (8)

THUS careful was the legiſlature, in the reign of Edward the third, to ſpecify and reduce to a certainty the vague no- [85]

[q] 1 Hawk. P. C. 42. [r] *Ibid.* 43. [s] 1 Hal. P. C. 231.

(8) By the ſtatute 7 Ann. c. 21. it is made high treaſon to ſlay any of the lords of ſeſſion, or lords of juſticiary, ſitting in judgment; or to counterfeit the king's ſeals appointed by the act of union. This ſtatute 7 Ann. c. 21. has alſo enacted that the crimes of high treaſon and miſpriſion of treaſon ſhall be exactly the ſame in England and Scotland; and that no acts in Scotland, except thoſe above ſpecified, ſhall be conſtrued high treaſon in Scotland, which are not high treaſon in England.

And all perſons proſecuted in Scotland for high treaſon, or miſpriſion of treaſon, ſhall be tried by a jury, and in the ſame manner as if they had been proſecuted for the ſame crime in England.

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tions of treaſon, that had formerly prevailed in our courts. But the act does not ſtop here, but goes on. "Becauſe "other like caſes of treaſon may happen in time to come, "which cannot be thought of nor declared at preſent, it is "accorded, that if any other caſe ſuppoſed to be treaſon, "which is not above ſpecified, doth happen before any "judge; the judge ſhall tarry without going to judgment of "the treaſon, till the cauſe be ſhewed and declared before "the king and his parliament, whether it ought to be judg-"ed treaſon, or other felony." Sir Matthew Hale[t] is very high in his encomiums on the great wiſdom and care of the parliament, in thus keeping judges within the proper bounds and limits of this act, by not ſuffering them to run out (upon their own opinions) into conſtructive treaſons, though in caſes that ſeem to them to have a like parity of reaſon; but reſerving them to the deciſion of parliament. This is a great ſecurity to the public, the judges, and even this ſacred act itſelf; and leaves a weighty *memento* to judges to be careful and not overhaſty in letting in treaſons by conſtruction or interpretation, eſpecially in new caſes that have not been reſolved and ſettled. 2. He obſerves, that as the authoritative deciſion of theſe *caſus omiſſi* is reſerved to the king and parliament, the moſt regular way to do it is by a new declarative act: and therefore the opinion of any one or of both houſes, though of very reſpectable weight, is not that ſolemn declaration referred to by this act, as the only criterion for judging of future treaſons.

In conſequence of this power, not indeed originally granted by the ſtatute of Edward III. but conſtitutionally inherent in every ſubſequent parliament, (which cannot be abridged of any rights by the act of a precedent one,) the legiſlature was extremely liberal in declaring new treaſons in the unfortunate reign of king Richard the ſecond: as, particularly, the killing of an embaſſador was made ſo; which ſeems to be founded upon better reaſon than the mul-

[t] Hal. P. C. 259.

titude

titude of other points, that were then ſtrained up to this high offence: the moſt arbitrary and abſurd of all which was by the ſtatute 21 Ric. II. c. 3. which made the bare purpoſe and intent of killing or depoſing the king, without any overt act to demonſtrate it, high treaſon. And yet ſo little effect have ever violent laws to prevent any crime, that within two years afterwards this very prince was both depoſed and murdered. And in the firſt year of his ſucceſſor's reign, an act was paſſed[n], reciting, "that no man knew "how he ought to behave himſelf, to do, ſpeak, or ſay, for "doubt of ſuch pains of treaſon: and therefore it was ac-"corded, that in no time to come any treaſon be judged, "otherwiſe than was ordained by the ſtatute of king Edward "the third." This at once ſwept away the whole load of extravagant treaſons introduced in the time of Richard the ſecond.

But afterwards, between the reign of Henry the fourth and queen Mary, and particularly in the bloody reign of Henry the eighth, the ſpirit of inventing new and ſtrange treaſons was revived; among which we may reckon the offences of clipping money; breaking priſon or reſcue, when the priſoner is committed for treaſon; burning houſes to extort money; ſtealing cattle by Welchmen; counterfeiting foreign coin; wilful poiſoning; execrations againſt the king; calling him opprobrious names by public writing; counterfeiting the ſign manual or ſignet; refuſing to abjure the pope; deflowering or marrying, without the royal licence, any of the king's children, ſiſters, aunts, nephews, or nieces; bare ſolicitation of the chaſtity of the queen or princeſs, or advances made by themſelves; marrying with the king, by a woman not a virgin, without previouſly diſcovering to him ſuch her unchaſte life; judging or *believing* (manifeſted by any overt act) the king to have been lawfully married to Anne of Cleve; derogating from the king's royal ſtile and title; impugning his ſupremacy; and aſſembling riotouſly to the number of twelve, and not diſperſing upon proclamation: all which new-fangled treaſons were totally abrogated by the

[n] Stat. 1 Hen. IV. c. 10.

2. WITH regard to treaſons relative to the *coin* or other *royal ſignatures*, we may recollect that the only two offences

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or either houſe of parliament, for the alteration of any matters eſtabliſhed in church or ſtate, or for the purpoſe of deliberating upon any grievance in the ſame, unleſs notice of ſuch a meeting be given in the names of ſeven houſeholders in ſome public newſpaper five days at the leaſt before the meeting; and every publiſher of a newſpaper, who advertiſes ſuch a meeting without ſuch a notice as is particularly deſcribed in the ſtatute, ſhall forfeit the ſum of 50 *l.*

Or inſtead of being inſerted in a newſpaper, it may be ſent five days before the meeting to the clerk of the peace of the county, who ſhall immediately tranſmit a copy of it to three juſtices of the peace reſident within the county. But all meetings, without ſuch previous notice, conſiſting of more than fifty perſons, aſſembled for the aforeſaid purpoſes, ſhall be unlawful aſſemblies: and if, after a proclamation made by a magiſtrate to diſperſe, more than twelve continue together, they will be guilty of a capital felony. And if in a meeting held purſuant to notice, it ſhall either be propoſed in the notice, or any one ſhall propoſe at the meeting, to alter without authority of parliament any matter eſtabliſhed by law, or make any propoſition to excite hatred againſt the king, or the conſtitution, then one or more juſtices may order the aſſembly to diſperſe, and may order the perſons who made ſuch propoſitions to be taken into cuſtody. And every perſon who ſhall obſtruct any magiſtrate in the diſcharge of his duty in enforcing the directions of this ſtatute, ſhall ſuffer death without benefit of clergy.

The magiſtrates in Scotland have the ſame authority as juſtices of the peace in England. And if any perſon ſhall open a houſe where lectures ſhall be read upon public grievances, or the laws and government of theſe kingdoms, to which perſons ſhall be admitted for money, ſuch houſe, unleſs previouſly licenſed, ſhall be conſidered a diſorderly houſe; and the perſon by whom it is opened ſhall forfeit 100*l*; and all other perſons concerned, as the preſident or chairman at ſuch lectures, or all who ſhall pay or receive money for admiſſion, or who ſhall deliver out tickets, ſhall alſo forfeit the ſame ſum. But two juſtices may grant a licence to read ſuch lectures, which ſhall continue in force for one year, unleſs ſooner revoked by the juſtices at the quarter-ſeſſions. But this ſtatute does not extend to lectures delivered in the univerſities, or to diſcourſes given by ſchool-maſters to their ſcholars.

Proſecutions

reſpecting the coinage, which are made treaſon by the ſtatute 25 Edw. III, are the actual counterfeiting the gold and ſilver coin of this kingdom; or the importing ſuch counterfeit money with intent to utter it, knowing it to be falſe. But theſe not being found ſufficient to reſtrain the evil practices of coiners and falſe moneyers, other ſtatutes have been ſince made for that purpoſe. The crime itſelf is made a ſpecies of high treaſon; as being a breach of allegiance, by infringing the king's prerogative, and aſſuming one of the attributes of the ſovereign, to whom alone it belongs to ſet the value and denomination of coin made at home, or to fix the currency of foreign money: and beſides, as all money which bears

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Proſecutions and actions under this ſtatute to be commenced within three months after the offence. 36 *Geo. III.* c. 8.

This laſt ſtatute was only to continue in force for three years. But ſuch have been the ſalutary effects of this excellent ſtatute, that it cannot be doubted but it will be continued for ſome further period.

The ſeditious meetings which were held before the paſſing of this ſtatute were in fact temporary inſurrections, and a ſcandal to any regular government; and however vehement the arguments of ſome, but principally of thoſe whom they were intended to reſtrain, that public liberty was endangered, yet it ought to be remembered that public liberty cannot exiſt without public ſecurity. The antient conſtitutional meetings for the inveſtigation of public affairs, with which our forefathers were contented, are not in the ſmalleſt degree affected by this ſtatute. A public meeting may at any time be called to take into conſideration the ſtate of the nation or the conduct of the King's miniſters by a lord lieutenant, *cuſtos rotulorum*, ſheriff of a county, a convener of a county or ſtewartry in Scotland, two juſtices of the peace, the major part of a grand jury either at the aſſizes or quarter-ſeſſions, the mayor or head officer of any city or town corporate, or the alderman or head officer of any ward or diviſion, or any corporate body. All theſe may in their reſpective juriſdictions call public meetings, which have the ſame uncontrolled power of diſcuſſion as they had before the ſtatute. Can then any wiſe and well-intentioned Engliſhman ſay that his liberty is violated by this valuable ſtatute?

the ſtamp of the kingdom is ſent into the world upon the public faith, as containing metal of a particular weight and ſtandard, whoever falſifies this is an offender againſt the ſtate, by contributing to render that public faith ſuſpected. And upon the ſame reaſons, by a law of the emperor Conſtantine [y], falſe coiners were declared guilty of high treaſon, and were condemned to be burnt alive: as, by the laws of Athens [z], all counterfeiters, debaſers, and diminiſhers of the current coin were ſubjected to capital puniſhment. However, it muſt be owned, that this method of reaſoning is a little overſtrained: counterfeiting or debaſing the coin being uſually practiſed, rather for the ſake of private and unlawful lucre, than out of any diſaffection to the ſovereign. And therefore both this and its kindred ſpecies of treaſon, that of counterfeiting the ſeals of the crown or other royal ſignatures, ſeem better denominated by the later civilians a branch of the *crimen falſi* or forgery, (in which they are followed by Glanvil [a], Bracton [b], and Fleta [c],) than by Conſtantine and our Edward the third, a ſpecies of the *crimen laeſae majeſtatis* or high treaſon. For this confounds the diſtinction and proportion of offences; and, by affixing the ſame ideas of guilt upon the man who coins a leaden groat and him who aſſaſſinates his ſovereign, takes off from that horror which ought to attend the very mention of the crime of high treaſon, and makes it more familiar to the ſubject. Before the ſtatute 25 Edw. III. the offence of counterfeiting the coin was held to be only a ſpecies of petit treaſon [d]; but ſubſequent acts in their new extenſions of the offence have followed the example of that ſtatute, and have made it equally high treaſon with an endeavour to ſubvert the government, though not quite equal in it's puniſhment.

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In conſequence of the principal thus adopted, the ſtatute 1 Mar. c. 1. having at one ſtroke repealed all intermediate

[y] C. 9. 24. 2. *Cod. Theod. de falſa monet.* l. 9.
[z] Pott. Antiq. b. 1. c. 26.
[a] l. 14. c. 7.
[b] l. 3. tr. 3. § 2 & 3.
[c] l. 1. c. 21.
[d] 1 Hal. P. C. 234.

treaſons

treaſons created ſince the 25 Edw. III. it was thought expedient by ſtatute 1 Mar. ſt. 2. c. 6. to revive two ſpecies thereof; *viz.* 1. That if any perſon falſely forge or counterfeit any ſuch kind of coin of gold or ſilver, as is not the proper coin of this realm, but ſhall be current within this realm by conſent of the crown; or, 2. ſhall falſely forge or counterfeit the ſign manual, privy ſignet, or privy ſeal; ſuch offences ſhall be deemed high treaſon. And by ſtatute 1 & 2 P. & M. c. 11. if any perſons do bring into this realm ſuch falſe or counterfeit foreign money, being current here, knowing the ſame to be falſe, with intent to utter the ſame in payment, they ſhall be deemed offenders in high treaſon. The money referred to in theſe ſtatutes muſt be ſuch as is abſolutely current here, in all payments, by the king's proclamation; of which there is none at preſent, Portugal money being only taken by conſent, as approaching the neareſt to our ſtandard; and falling in well enough with our diviſions of money into pounds and ſhillings: therefore to counterfeit it is not high treaſon, but another inferior offence (10). Clipping or defacing the genuine coin was not hitherto included in theſe ſtatutes; though an offence equally pernicious to trade, and an equal inſult upon the prerogative, as well as perſonal affront to [90]

(10) But now by the 37 Geo. III. c. 126. if any perſon ſhall coin or counterfeit any kind of foreign gold or ſilver coin, though not current within this realm, he ſhall be guilty of felony, and may be tranſported for ſeven years; and if any perſon knowingly and fraudulently ſhall bring any counterfeit coin into the kingdom, he ſhall be ſubject to the ſame puniſhment.

And if any perſon knowingly utter, or tender in payment, or pay any ſuch counterfeit foreign coin, for the firſt offence he ſhall be impriſoned ſix months, and find ſureties for his good behaviour for ſix more; for the ſecond offence he ſhall be impriſoned two years; and for the third he ſhall be guilty of a capital felony.

And if any perſon without lawful excuſe ſhall have more than five ſuch counterfeit pieces in his cuſtody, he may be convicted before a juſtice; and forfeit from 40 *s.* to 5 *l.* for each piece, and for failure of payment may be impriſoned three months.

the ſovereign; whoſe very image ought to be had in reverence by all loyal ſubjects. And therefore, among the Romans [e], defacing or even melting down the emperor's ſtatues was made treaſon by the Julian law; together with other offences of the like ſort, according to that vague concluſion, "*aliudve quid ſimile ſi admiſerint.*" And now, in England, by ſtatute 5 Eliz. c. 11. clipping, waſhing, rounding, or filing, for wicked gain's ſake, any of the money of this realm, or other money ſuffered to be current here, ſhall be adjudged high treaſon; and by ſtatute 18 Eliz. c. 1. (becauſe "the ſame law, being penal, ought to be taken and expounded ſtrictly according to the words thereof, and the like offences, not by any equity to receive the like puniſhment or pains") the ſame ſpecies of offence is therefore deſcribed in other more general words; *viz.* impairing, diminiſhing, falſifying, ſcaling, and lightening; and made liable to the ſame penalties. By ſtatute 8 & 9 W. III. c. 26. made perpetual by 7 Ann. c. 25. whoever, without proper authority, ſhall knowingly make or mend, or aſſiſt in ſo doing, or ſhall buy, ſell, conceal, hide, or knowingly have in his poſſeſſion, any implements of coinage ſpecified in the act, or other tools or inſtruments proper only for the coinage of money; or ſhall convey the ſame out of the king's mint; he, together with his counſellors, procurers, aiders, and abettors, ſhall be guilty of high treaſon; which is by much the ſevereſt branch of the coinage law. The ſtatute goes on farther, and enacts, that to mark any coin on the edges with letters, or otherwiſe, in imitation of thoſe uſed in the mint; or to colour, gild, or caſe over any coin reſembling the current coin, or even round blanks of baſe metal; ſhall be conſtrued high treaſon. But all proſecutions on this act are to be commenced within *three* months after the commiſſion of the offence: except thoſe for making or mending any coining tool or inſtrument, or for marking money round the edges; which are directed to be commenced within *ſix* months after the offence committed [f] (11).

[e] *Ff.* 48. 4. 6. [f] Stat. 7 Ann. c. 25.

(11) If a perſon is apprehended in the act of coining, or is proved to have made a conſiderable progreſs in making counterfeit pieces

And, laſtly, by ſtatute 15 & 16 Geo. II. c. 28. if any perſon colours or alters any ſhilling or ſixpence, either lawful or counterfeit, to make them reſpectively reſemble a guinea or [91]
half guinea; or any halfpenny or farthing to make them reſpectively reſemble a ſhilling or ſixpence; this is alſo high treaſon: but the offender ſhall be pardoned, in caſe (being out of priſon) he diſcovers and convicts two other offenders of the ſame kind.

3. THE other new ſpecies of high treaſon is ſuch as is created for the ſecurity of the *proteſtant ſucceſſion* over and above ſuch treaſons againſt the king and government as were comprized under the ſtatute 25 Edw. III. For this purpoſe, after the act of ſettlement was made, for transferring the crown to the illuſtrious Houſe of Hanover, it was enacted by ſtatute 13 & 14 W. III. c. 3. that the pretended prince of Wales, who was then thirteen years of age, and had aſſumed the title of king James III. ſhould be attainted of high treaſon; and it was made high treaſon for any of the king's ſubjects by letters, meſſages, or otherwiſe, to hold correſpondence with him, or any perſon employed by him, or to remit

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pieces reſembling the gold or ſilver coin of this realm, yet if they are ſo imperfect as that no one would take them, he cannot be convicted upon the charge of coining under this ſtatute. *Leach*, 71. 126. But he may be convicted, if he has made blank pieces without any impreſſion to the ſimilitude of ſilver coin worn ſmooth by time. *Welch's caſe*, Ibid. 293.

Or if any one ſhall put pieces of mixed metal into aqua fortis, which attracts the baſer metal and leaves the ſilver upon the ſurface, or as the vulgar ſay draws out the ſilver, this is held to be colouring under this ſtatute. *Ibid.* 140.

In a late caſe at Durham where a man had been committed more than three months before his trial for coining under this ſtatute, and upon conviction his caſe was reſerved for the opinion of the judges, they determined that the commitment was the commencement of the proſecution, otherwiſe this crime might be committed with impunity half the year in the four northern counties.

any money for his uſe, knowing the ſame to be for his ſervice. And by ſtatute 17 Geo. II. c. 39. it is enacted, that if any of the ſons of the pretender ſhall land or attempt to land in this kingdom, or be found in Great Britain, or Ireland, or any of the dominions belonging to the ſame, he ſhall be judged attainted of high treaſon, and ſuffer the pains thereof. And to correſpond with them, or to remit money for their uſe, is made high treaſon in the ſame manner as it was to correſpond with the father. By the ſtatute 1 Ann. ſt. 2. c. 17. if any perſon ſhall endeavour to deprive or hinder any perſon, being the next in ſucceſſion to the crown according to the limitations of the act of ſettlement, from ſucceeding to the crown, and ſhall maliciouſly and directly attempt the ſame by any overt act, ſuch offence ſhall be high treaſon. And by ſtatute 6 Ann. c. 7. if any perſon ſhall maliciouſly, adviſedly, and directly, by writing or printing, maintain and affirm, that any other perſon hath any right or title to the crown of this realm, otherwiſe than according to the act of ſettlement; or that the kings of this realm with the authority of parliament are not able to make laws and ſtatutes, to bind the crown and the deſcent thereof; ſuch perſon ſhall be guilty
[92] of high treaſon. This offence (or indeed maintaining this doctrine in any wiſe, that the king and parliament cannot limit the crown) was once before made high treaſon, by ſtatute 13 Eliz. c. 1. during the life of that princeſs. And after her deceaſe it continued a high miſdemeſnor, puniſhable with forfeiture of goods and chattels even in the moſt flouriſhing æra of indefeaſible hereditary right and *jure divino* ſucceſſion. But it was again raiſed into high treaſon, by the ſtatute of Anne before-mentioned, at the time of a projected invaſion in favour of the then pretender; and upon this ſtatute one Matthews, a printer, was convicted and executed in 1719, for printing a treaſonable pamphlet intitled "*vox populi vox Dei*[a] (12)."

[a] State Tr. IX. 680.

(12) By the ſtatute 33 Geo. III. c. 27. called the Traiterous Correſpondence Act, it is enacted, that if any perſon reſiding in Great

THUS much for the crime of treaſon, or *læſæ majeſtatis*, in all it's branches; which conſiſts, we may obſerve, originally, in groſsly counteracting that allegiance, which is due from the ſubject by either birth or reſidence: though, in ſome inſtances, the zeal of our legiſlators to ſtop the progreſs of ſome highly pernicious practices has occaſioned them a little to depart from this it's primitive idea. But of this enough has been hinted already: it is now time to paſs on from defining the crime to deſcribing it's puniſhment.

THE puniſhment of high treaſon in general is very ſolemn and terrible. 1. That the offender be drawn to the gallows, and not be carried or walk; though uſually (by connivance [h], at length ripened by humanity into law) a ſledge or hurdle is allowed, to preſerve the offender from the extreme torment of being dragged on the ground or pavement [i]. 2. That he

[h] 33 Aſſ. pl. 7. [i] 1 Hal. P. C. 382.

Great Britain ſhall, during the preſent war with France, either on his own account or on account of any other perſon whatſoever, buy, ſell, procure, ſend, or aſſiſt in ſo doing, for the uſe of the French armies, or of any perſon reſident within the dominions of France, any ordnance ſtores, iron, lead, or copper, except cutlery ware not being arms, and except buttons, buckles, japanned wares, toys, and trinkets; or any bank notes, gold or ſilver; or any proviſions whatever; or any cloathing for the armies or fleets; or any leather, wrought or unwrought, without licence from the king or privy council, he ſhall be guilty of high treaſon. And every Britiſh ſubject, who ſhall purchaſe, or enter into any agreement for, any land or real property in France, ſhall alſo be guilty of high treaſon. And if any Britiſh ſubject ſhall voluntarily go, or embark in any veſſel with intent to go, from any place in Great Britain, into any part of France, without a licence, he ſhall be liable to be impriſoned for ſix months. And every inſurance upon property and articles, which are as above prohibited to be ſent from England to France, belonging to French ſubjects, upon any voyage whatever, or upon the ſame articles upon any voyage from any part of the world to any port in France, ſhall be null and void; and every perſon making ſuch an inſurance ſhall be ſubject to imprisonment for three months.

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be hanged by the neck, and then cut down alive. 3. That his entrails be taken out, and burned, while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the king's diſpoſal [i].

THE king may, and often doth, diſcharge all the puniſhment, except beheading, eſpecially where any of noble
[93] blood are attainted. For, beheading being part of the judgment, that may be executed, though all the reſt be omitted by the king's command [k]. But where beheading is no part of the judgment, as in murder or other felonies, it hath been ſaid that the king cannot change the judgment, although at the requeſt of the party, from one ſpecies of death to another [l]. But of this we ſhall ſay more hereafter [m].

IN the caſe of coining, which is a treaſon of a different complexion from the reſt, the puniſhment is milder for male offenders; being only to be drawn, and hanged by the neck till dead [n]. But in treaſons of every kind the puniſhment of women is the ſame, and different from that of men. For, as the decency due to the ſex forbids the expoſing and publicly mangling their bodies, their ſentence (which is to the full as terrible to ſenſation as the other) is to be drawn to the gallows, and there to be burned alive [o] (13).

THE conſequences of this judgment (attainder, forfeiture, and corruption of blood) muſt be referred to the latter end of this book, when we ſhall treat of them all together, as well in treaſon as in other offences.

[i] This puniſhment for treaſon, ſir Edward Coke tells us, is warranted by divers examples in ſcripture; for Joab was drawn, Bithan was hanged, Judas was embowelled, and ſo of the reſt. (3 Inſt. 211.)

[k] 1 Hal. P. C. 351.

[l] 3 Inſt. 52.

[m] See ch. 32.

[n] 1 Hal. P. C. 351.

[o] 2 Hal. P. C. 399.

(13) But now by the ſtatute 30 Geo. III. c. 48. women convicted in all caſes of treaſon, ſhall receive judgment to be drawn to the place of execution, and there to be hanged by the neck till dead.

CHAPTER THE SEVENTH.

OF FELONIES INJURIOUS TO THE KING'S PREROGATIVE.

AS, according to the method I have adopted, we are next to conſider ſuch felonies as are more immediately injurious to the king's prerogative, it will not be amiſs here, at our firſt entrance upon this crime, to inquire briefly into the nature and meaning of *felony*: before we proceed upon any of the particular branches, into which it is divided.

FELONY, in the general acceptation of our Engliſh law, comprizes every ſpecies of crime, which occaſioned at common law the forfeiture of lands and goods. This moſt frequently happens in thoſe crimes, for which a capital puniſhment either is or was liable to be inflicted: for thoſe felonies which are called clergyable, or to which the benefit of clergy extends, were antiently puniſhed with death, in all lay, or unlearned, offenders; though now by the ſtatute-law that puniſhment is for the firſt offence univerſally remitted. Treaſon itſelf, ſays ſir Edward Coke[a], was antiently comprized under the name of felony: and in confirmation of this we may obſerve, that the ſtatute of treaſons, 25 Edw. III. c. 2. ſpeaking of ſome dubious crimes, directs a reference to parliament; that it may be there adjudged, "whether they be treaſon, or [95] "*other* felony." All treaſons therefore, ſtrictly ſpeaking, are felonies; though all felonies are not treaſon. And to this alſo we may add, that not only all offences, now capital, are in ſome degree or other felony; but that this is likewiſe the caſe

[a] 3 Inſt. 15.

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with ſome other offences, which are not puniſhed with death; as ſuicide, where the party is already dead; homicide by chance-medley, or in ſelf-defence; and petit larceny, or pilfering; all which are (ſtrictly ſpeaking) felonies, as they ſubject the committers of them to forfeitures. So that upon the whole the only adequate definition of felony ſeems to be that which is before laid down; *viz.* an offence which occaſions a total forfeiture of either lands, or goods, or both, at the common law; and to which capital or other puniſhment may be ſuperadded, according to the degree of guilt.

To explain this matter a little farther: the word *felony*, or *felonia*, is of undoubted feodal original, being frequently to be met with in the books of feuds, &c. but the derivation of it has much puzzled the juridical lexicographers, Prateus, Calvinus, and the reſt: ſome deriving it from the Greek φηλος, an impoſtor or deceiver; others from the Latin, *fallo*, *fefelli*, to countenance which they would have it called *fallonia*. Sir Edward Coke, as his manner is, has given us a ſtill ſtranger etymology [b]; that it is *crimen animo felleo perpetratum*, with a bitter or galliſh inclination. But all of them agree in the deſcription, that it is ſuch a crime as occaſions a forfeiture of all the offender's lands, or goods. And this gives great probability to ſir Henry Spelman's Teutonic or German derivation of it [c]: in which language indeed, as the word is clearly of feodal original, we ought rather to look for it's ſignification, than among the Greeks and Romans. *Fe-lon* then, according to him, is derived from two northern words; *fee*, which ſignifies (we well know) the fief, feud, or beneficiary eſtate: and *lon*, which ſignifies price or value. Felony is therefore the ſame as *pretium feudi*, the conſideration for which a man gives up his fief; as we ſay in common [96] ſpeech, ſuch an act is as much as your life, or eſtate, is worth. In this ſenſe it will clearly ſignify the feodal forfeiture or act by which an eſtate is forfeited, or eſcheats to the lord (1).

[b] 1 Inſt. 391. [c] Gloſſar. *tit. Felon.*

(1) But a forfeiture of land is not a neceſſary conſequence of felony; for petit larceny is felony, which does not produce a forfeiture

To confirm this we may obſerve, that it is in this ſenſe, of forfeiture to the lord, that the feodal writers conſtantly uſe it. For all thoſe acts, whether of a criminal nature or not, which at this day are generally forfeitures of copyhold eſtates [d], are ſtiled *felonia* in the feodal law: "*ſcilicet, per quas feudum amittitur* [e]." As, "*ſi domino deſervire noluerit* [f]; *ſi per annum et diem ceſſaverit in petenda inveſtitura* [g]; "*ſi dominum ejuravit, i. e. negavit ſe a domino feudum habere* [h]; "*ſi a domino, in jus eum vocante, ter citatus non comparuerit* [i];" all theſe, with many others, are ſtill cauſes of forfeiture in our copyhold eſtates, and were denominated felonies by the feodal conſtitutions. So likewiſe injuries of a more ſubſtantial or criminal nature were denominated felonies, that is, forfeitures: as aſſaulting or beating the lord [k]; vitiating his wife or daughter, "*ſi dominum cucurbiterit, i. e. cum uxore "ejus concubuerit* [l];" all theſe are eſteemed felonies, and the latter is expreſsly ſo denominated, "*ſi fecerit feloniam, do-"minum forte cucurbitando* [m]." And as theſe contempts, or ſmaller offences, were felonies or acts of forfeiture, of courſe greater crimes, as murder and robbery, fell under the ſame denomination. On the other hand, the lord might be guilty of felony, or forfeit his ſeignory to the vaſal, by the ſame acts as the vaſal would have forfeited his feud to the lord. "*Si dominus commiſit feloniam, per quam vaſallus amitteret feudum "ſi eam commiſerit in dominum, feudi proprietatem etiam dominus "perdere debet* [n]." One inſtance given of this ſort of felony in the lord is beating the ſervant of his vaſal, ſo as that he loſes his ſervice; which ſeems merely in the nature of a civil injury, ſo far as it reſpects the vaſal. And all theſe felonies [97] were to be determined "*per laudamentum ſive judicium parium*

[d] See vol. II. pag. 284.
[e] *Feud. l.* 2. *t.* 16. *in calc.*
[f] *Ibid. l.* 1. *t.* 21.
[g] *Ibid. l.* 2. *t.* 24.
[h] *Ibid. l.* 2. *t.* 34. *l.* 2. *t.* 26. § 3.
[i] *Feud. l.* 2. *t.* 22.
[k] *Ibid. l.* 2. *t.* 24. § 2.
[l] *Ibid. l.* 1. *t.* 5.
[m] *Ibid. l.* 2. *t.* 38. *Britton. l.* 1. *c.* 22.
[n] *Ibid. l.* 2. *t.* 26 & 47.

feiture of lands; but every ſpecies of felony is followed by a forfeiture of goods and perſonal chattels.

"*ſuorum*"

"*ſuorum*" in the lord's court; as with us forfeitures of copyhold lands are preſentable by the homage in the court-baron.

FELONY, and the act of forfeiture to the lord, being thus ſynonymous terms in the feodal law, we may eaſily trace the reaſon why, upon the introduction of that law into England, thoſe crimes which induced ſuch forfeiture or eſcheat of lands (and, by a ſmall deflection from the original ſenſe, ſuch as induced the forfeiture of goods alſo) were denominated felonies. Thus it was ſaid, that ſuicide, robbery, and rape, were felonies; that is, the conſequence of ſuch crimes was forfeiture; till by long uſe we began to ſignify by the term of felony the actual crime committed, and not the penal conſequence. And upon this ſyſtem only can we account for the cauſe, why treaſon in antient times was held to be a ſpecies of felony; *viz.* becauſe it induced a forfeiture.

HENCE it follows, that capital puniſhment does by no means enter into the true idea and definition of felony. Felony may be without inflicting capital puniſhment, as in the caſes inſtanced of ſelf-murder, excuſable homicide, and petit larceny: and it is poſſible that capital puniſhments may be inflicted, and yet the offence be no felony; as in caſe of hereſy by the common law, which, though capital, never worked any forfeiture of lands or goods, an inſeparable incident to felony. And of the ſame nature was the puniſhment of ſtanding mute, without pleading to an indictment; which at the common law was capital, but without any forfeiture, and therefore ſuch ſtanding mute was no felony. In ſhort the true criterion of felony is forfeiture; for, as ſir Edward Coke juſtly obſerves [p], in all felonies which are puniſhable with death, the offender loſes all his lands in fee-ſimple, and alſo his goods and chattels; in ſuch as are not ſo puniſhable, his goods and chattels only.

[98] THE idea of felony is indeed ſo generally connected with that of capital puniſhment, that we find it hard to ſeparate

[p] 3 Inſt. 43. [p] 1 Inſt. 391.

them;

them; and to this uſage the interpretations of the law do now conform. And therefore if a ſtatute makes any new offence felony, the law [q] implies that it ſhall be puniſhed with death, *viz.* by hanging, as well as with forfeiture: unleſs the offender prays the benefit of clergy; which all felons are entitled once to have, provided the ſame is not expreſsly taken away by ſtatute. And, in compliance herewith, I ſhall for the future conſider it alſo in the ſame light, as a generical term, including all capital crimes below treaſon; having premiſed thus much concerning the true nature and original meaning of felony, in order to account for the reaſon of thoſe inſtances I have mentioned, of felonies that are not capital, and capital offences that are not felonies: which ſeem at firſt view repugnant to the general idea which we now entertain of felony, as a crime to be puniſhed by death: whereas properly it is a crime to be puniſhed by forfeiture, and to which death may, or may not be, though it generally is, ſuperadded.

I PROCEED now to conſider ſuch felonies, as are more immediately injurious to the king's prerogative. Theſe are, 1. Offences relating to the coin, not amounting to treaſon. 2. Offences againſt the king's council. 3. The offence of ſerving a foreign prince. 4. The offence of imbezzling or deſtroying the king's armour or ſtores of war. To which may be added a fifth, 5. Deſertion from the king's armies in time of war.

1. OFFENCES relating to the *coin*, under which may be ranked ſome inferior miſdemeſnors not amounting to felony, are thus declared by a ſeries of ſtatutes, which I ſhall recite in the order of time. And, firſt, by ſtatute 27 Edw. I. c. 3. none ſhall bring pollards and crockards, which were foreign coins of baſe metal, into the realm on pain of forfeiture of life and goods. By ſtatute 9 Edw. III. ſt. 2. no ſterling money ſhall be melted down, upon pain of forfeiture thereof. By ſtatute 17 Edw. III. none ſhall be ſo hardy to bring falſe [99] and ill money into the realm, on pain of forfeiture of life

[q] 1 Hawk. P. C. 107. 2 Hawk. P. C. 444.

and member by the perſons importing, and the ſearchers permitting ſuch importation. By ſtatute 3 Hen. 5. ſt. 1. to make, coin, buy, or bring into the realm any gally-halfpence, ſuſkins, or dotkins, in order to utter them, is felony; and knowingly to receive or pay either them or *blanks*[r] is forfeiture of an hundred ſhillings. By ſtatute 14 Eliz. c. 3. ſuch as forge any foreign coin, although it be not made current here by proclamation, ſhall (with their aiders and abettors) be guilty of miſpriſon of treaſon: a crime which we ſhall hereafter conſider. By ſtatute 13 & 14 Car. II. c. 31. the offence of melting down any current ſilver money ſhall be puniſhed with forfeiture of the ſame, and alſo the double value: and the offender, if a freeman of any town, ſhall be disfranchiſed; if not, ſhall ſuffer ſix months impriſonment. By ſtatute 6 & 7 W. III. c. 17. if any perſon buys or ſells, or knowingly has in his cuſtody, any clippings or filings of the coin, he ſhall forfeit the ſame and 500 *l.*; one moiety to the king, and the other to the informer; and be branded in the cheek with the letter R. By ſtatute 8 & 9 W. III. c. 26. if any perſon ſhall blanch or whiten, copper for ſale (which makes it reſemble ſilver); or buy or ſell or offer to ſale any malleable compoſition, which ſhall be heavier than ſilver, and look, touch, and wear like gold, but be beneath the ſtandard: or if any perſon ſhall receive or pay at a leſs rate than it imports to be of (which demonſtrates a conſciouſneſs of it's baſeneſs, and a fraudulent deſign) any counterfeit or diminiſhed milled money of this kingom, not being cut in pieces (2); an ope-

[r] Stat. 2 Hen. VI. c. 9.

(2) Selling baſe and counterfeit money at a lower rate than it's denomination imports, as twenty bad half crowns for a guinea, is a crime of great magnitude, and in populous towns is much practiſed. The offender in this caſe is either the coiner himſelf, or the wholeſale dealer between the coiner and the utterer, who puts each piece into circulation at it's full apparent value. The ſtatute declares that the offender ſhall *ſuffer death as in caſe of felony*; but not having expreſsly taken away the benefit of clergy, for the firſt offence he was ſubject only to be burnt in the hand, and to ſuffer

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ration which is expreſsly directed to be performed when any ſuch money ſhall be produced in evidence, and which any perſon, to whom any gold or ſilver money is tendered, is empowered by ſtatutes 9 & 10 W. III. c. 21. 13 Geo. III. c. 71. and 14 Geo. III. c. 70. to perform at his own hazard, and the officers of the exchequer and receivers general of the taxes are particularly required to perform: all ſuch perſons ſhall be guilty of felony; and may be proſecuted for the ſame at any time within three months after the offence committed. But theſe precautions not being found ſufficient to prevent [100] the uttering of falſe or diminiſhed money, which was only a miſdemeſnor at common law, it is enacted by ſtatute 15 & 16 Geo. II. c. 28. that if any perſon ſhall utter or tender in payment any counterfeit coin, knowing it ſo to be, he ſhall for the firſt offence be impriſoned ſix months, and find ſureties for his good behaviour for ſix months more: for the ſecond offence, ſhall be impriſoned two years, and find ſureties for two years longer: and, for the third offence, ſhall be guilty of felony without benefit of clergy. Alſo if a perſon knowingly tenders in payment any counterfeit money, and at the ſame time has more in his cuſtody; or ſhall, within ten days after, knowingly tender other falſe money; he ſhall be deemed a common utterer of counterfeit money, and ſhall for the firſt offence be impriſoned one year, and find ſureties for his good behaviour for two years longer; and for the ſecond, be guilty of felony without benefit of clergy. By

one year's impriſonment; and ſince the 19 Geo. III. c. 74. the burning in the hand may be changed by the court into a fine, or whipping publicly or privately, but not more than three times. An offender of this deſcription muſt neceſſarily be ſo converſant with coining or coiners that public policy requires that in the firſt inſtance he ſhould be ſent out of the kingdom.

In a caſe where the priſoner had counted out a quantity of bad money, and placed it upon a table for a perſon who had agreed to buy it, but before it was paid for, and whilſt it lay upon the table, the priſoner was apprehended, it was held that he had not *paid it* or *put it off*, ſo as to be guilty of this crime. *Wooldridge's caſe*, Leach, 251.

the ſame ſtatute it is alſo enacted, that if any perſon counterfeits the copper coin, he ſhall ſuffer two years impriſonment, and find ſureties for two years more. By ſtatute 11 Geo. III. c. 40. perſons counterfeiting copper halfpence or farthings, with their abettors; or buying, ſelling, receiving, or putting off any counterfeit copper money (not being cut in pieces or melted down) at a leſs value that it imports to be of; ſhall be guilty of ſingle felony (3). And by a temporary ſtatute (14 Geo. III. c. 42.) if any quantity of money, exceeding the ſum of five pounds, being or purporting to be the ſilver coin of this realm, but below the ſtandard of the mint in weight or fineneſs, ſhall be imported into Great Britain or Ireland, the ſame ſhall be forfeited in equal moieties to the crown and proſecutor (4). Thus much for offences relating to the coin, as well miſdemeſnors as felonies, which I thought it moſt convenient to conſider in one and the ſame view.

2. FELONIES, againſt the king's *council*[s], are theſe. Firſt, by ſtatute 3 Hen. VII. c. 14. if any ſworn ſervant of the king's houſhold conſpires or confederates to kill any lord of this
[101] realm, or other perſon, ſworn of the king's council, he ſhall be guilty of felony. Secondly, by ſtatute 9 Ann. c. 16. to aſſault, ſtrike, wound, or attempt to kill, any privy counſellor in the execution of his office, is made felony without benefit of clergy.

3. FELONIES in *ſerving foreign ſtates*, which ſervice is generally inconſiſtent with allegiance to one's natural prince,

[s] See Vol. I. pag. 334.

(3) The 15 & 16 Geo. II. c. 28. and the 11 Geo. III. c. 40. ſpecify *halfpence* and *farthings* only, but other pieces of copper money having been ſince coined, the proviſions of thoſe ſtatutes by the 37 Geo. III. c. 126. are extended to all other pieces of copper money which are ordered to be current by the king's proclamation.

(4) This ſtatute by the 39 Geo. III. c. 75. is revived and made perpetual.

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are reſtrained and puniſhed by ſtatute 3 Jac. I. c. 4. which makes it felony for any perſon whatever to go out of the realm, to ſerve any foreign prince, without having firſt taken the oath of allegiance before his departure. And it is felony alſo for any gentleman, or perſon of higher degree, or who hath borne any office in the army, to go out of the realm to ſerve ſuch foreign prince or ſtate, without previouſly entering into a bond with two ſureties, not to be reconciled to the ſee of Rome, or enter into any conſpiracy againſt his natural ſovereign. And farther, by ſtatute 9 Geo. II. c. 30. enforced by ſtatute 29 Geo. II. c. 17. if any ſubject of Great Britain ſhall enliſt himſelf, or if any perſon ſhall procure him to be enliſted, in any foreign ſervice, or detain or embark him for that purpoſe, without licence under the king's ſign manual, he ſhall be guilty of felony without benefit of clergy: but if the perſon, ſo enliſted or enticed, ſhall diſcover his ſeducer within fifteen days, ſo as he may be apprehended and convicted of the ſame, he ſhall be indemnified. By ſtatute 29 Geo. II. c 17. it is moreover enacted, that to ſerve under the French king, as a military officer, ſhall be felony without benefit of clergy; and to enter into the Scotch brigade, in the Dutch ſervice, without previouſly taking the oaths of allegiance and abjuration, ſhall be a forfeiture of 500*l.*

4. FELONY by *imbezzling* or *deſtroying* the king's *armour* or warlike *ſtores*, is, in the firſt place, ſo declared to be by ſtatute 31 Eliz. c. 4. which enacts, that if any perſon having the charge or cuſtody of the king's armour, ordnance, ammunition, or habiliments of war; or of any victual provided for victualling the king's ſoldiers or mariners; ſhall, either for gain, or to impede his Majeſty's ſervice, imbezzle the ſame to the value of twenty ſhillings, ſuch offence ſhall be felony. [102] And the ſtatute 22 Car. II. c. 5. takes away the benefit of clergy from this offence, and from ſtealing the king's naval ſtores to the value of twenty ſhillings; with a power for the judge, after ſentence, to tranſport the offender for ſeven years. Other inferior imbezzlements and miſdemeſnors, that fall under this denomination, are puniſhed by ſtatutes 9 & 10

W. III. c. 41. 1 Geo. I. c. 25. 9 Geo. I. c. 8. & 17 Geo. II. c. 40. with fine, corporal puniſhment, and impriſonment. And by ſtatute 12 Geo. III. c. 24. to ſet on fire, burn, or deſtroy any of his majeſty's ſhips of war, whether built, building, or repairing; or any of the king's arſenals, magazines, dock-yards, rope-yards, or victualling offices, or materials thereunto belonging; or military, naval, or victualling ſtores, or ammunition; or cauſing, aiding, procuring, abetting, or aſſiſting in, ſuch offence; ſhall be felony without benefit of clergy.

5. DESERTION from the king's armies in time of war, whether by land or ſea, in England or in parts beyond the ſeas, is by the ſtanding laws of the land (excluſive of the annual acts of parliament to puniſh mutiny and deſertion) and particularly by ſtatute 18 Hen. VI. c. 19. and 5 Eliz. c. 5. made felony, but not without benefit of clergy. But by the ſtatute 2 & 3 Edw. VI. c. 2. clergy is taken away from ſuch deſerters, and the offence is made triable by the juſtices of every ſhire. The ſame ſtatutes puniſh other inferior military offences with fines, impriſonment, and other penalties (5).

(5) To this claſs of felonies injurious to the king's prerogative may be added two felonies lately created by the legiſlature, who thought it expedient to repreſs the attempts of miſchievous and diſaffected perſons by tranſportation or capital puniſhment. The 37 Geo. III. c. 70. enacts, that if any perſon ſhall maliciouſly and adviſedly endeavour to ſeduce any perſon ſerving in his majeſty's ſervice by ſea or land from his duty and allegiance, or to incite any perſon to commit any act of mutiny or mutinous practice, he ſhall be guilty of felony, and ſhall ſuffer death without benefit of clergy.

The crime wherever committed may be tried in any county.

And by the ſame ſtatute, c. 123. it is enacted that whoever ſhall adminiſter, or cauſe to be adminiſtered, or ſhall be preſent at and conſenting to the adminiſtering of, or ſhall take any oath or engagement intended to bind any perſon in any mutinous or ſeditious purpoſe, or to belong to any ſeditious ſociety or confederacy, or to obey any committee, or any perſon, not having legal authority for that purpoſe, or not to give evidence againſt any confederate

ſederate or other perſon, or not to diſcover any unlawful combination, or any illegal act, or any illegal oath or engagement, ſhall be guilty of felony, and may be tranſported for ſeven years. Compulſion ſhall be no excuſe, unleſs the party within four days after he has an opportunity diſcloſe the whole of the caſe to a juſtice of the peace, or if a ſeaman or ſoldier, to his commanding officer. Any offence againſt this act committed anywhere may be tried in any county, unleſs it be committed in Scotland; it ſhall then be tried in the criminal courts of that country.

Any perſon acquitted under either of theſe ſtatutes ſhall not be proſecuted again for the ſame fact for high treaſon; but theſe ſtatutes ſhall not prevent any perſon not already tried under theſe ſtatutes from being proſecuted for high treaſon, in the ſame manner as if they had not been paſſed.

CHAPTER THE EIGHTH.

OF PRAEMUNIRE.

A THIRD ſpecies of offence more immediately affecting the king and his government, though not ſubject to capital puniſhment, is that of *praemunire*: ſo called from the words of the writ preparatory to the proſecution thereof: "*praemunire*[a] *facias A. B.*" cauſe A. B. to be forewarned that he appear before us to anſwer the contempt wherewith he ſtands charged; which contempt is particularly recited in the preamble to the writ[b]. It took it's original from the exorbitant power claimed and exerciſed in England by the pope, which even in the days of blind zeal was too heavy for our anceſtors to bear.

IT may juſtly be obſerved, that religious principles, which (when genuine and pure) have an evident tendency to make their profeſſors better citizens as well as better men, have (when perverted and erroneous) been uſually ſubverſive of civil government, and been made both the cloak and the inſtrument of every pernicious deſign that can be harboured in the heart of man. The unbounded authority that was exerciſed by the druids in the weſt, under the influence of pagan ſuperſtition, and the terrible ravages committed by the Saracens in the eaſt, to propagate the religion of Mahomet, both witneſs to the truth of that antient univerſal obſervation, that in all ages and in all countries, civil and eccleſiaſtical tyranny

[a] A barbarous word for *praemuneri* (1). [b] Old *Nat. Brev.* 101. *edit.* 1534.

(1) *Praemunio*, in law-latin, is uſed in all its tenſes and participles, for *praemoneo* or *cito*. DUCANGE *Gloſſ.*

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are mutually productive of each other. It is therefore the glory of the church of England, that ſhe inculcates due obedience to lawful authority, and hath been (as her prelates on a trying occaſion once expreſſed it [c]) in her principles and [104] practice ever moſt unqueſtionably loyal. The clergy of her perſuaſion, holy in their doctrines and unblemiſhed in their lives and converſation, are alſo moderate in their ambition, and entertain juſt notions of the ties of ſociety and the rights of civil government. As in matters of faith and morality they acknowledge no guide but the ſcriptures, ſo, in matters of external polity and of private right, they derive all their title from the civil magiſtrate; they look up to the king as their head, to the parliament as their law-giver, and pride themſelves in nothing more juſtly, than in being true members of the church, emphatically *by law* eſtabliſhed. Whereas the notions of eccleſiaſtical liberty, in thoſe who differ from them, as well in one extreme as the other, (for I here only ſpeak of extremes,) are equally and totally deſtructive of thoſe ties and obligations by which all ſociety is kept together; equally encroaching on thoſe rights, which reaſon and the original contract of every free ſtate in the univerſe have veſted in the ſovereign power; and equally aiming at a diſtinct independent ſupremacy of their own, where ſpiritual men and ſpiritual cauſes are concerned. The dreadful effects of ſuch a religious bigotry, when actuated by erroneous principles, even of the proteſtant kind, are ſufficiently evident from the hiſtory of the anabaptiſts in Germany, the covenanters in Scotland, and that deluge of ſectaries in England, who murdered their ſovereign, overturned the church and monarchy, ſhook every pillar of law, juſtice, and private property, and moſt devoutly eſtabliſhed a kingdom of the ſaints in their ſtead. But theſe horrid devaſtations, the effects of mere madneſs, or of zeal that was nearly allied to it, though violent and tumultuous, were but of a ſhort duration. Whereas the progreſs of the papal policy, long actuated by the ſteady counſels of ſucceſſive pontiffs, took deeper root, and was at length in ſome places with difficulty, in others

[c] Addreſs to James II. 1687.

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never yet, extirpated. For this we might call to witneſs the black intrigues of the jeſuits, ſo lately triumphant over Chriſtendom, but now univerſally abandoned by even the Roman catholic powers: but the ſubject of our preſent
[105] chapter rather leads us to conſider the vaſt ſtrides, which were formerly made in this kingdom by the popiſh clergy; how nearly they arrived to effecting their grand deſign; ſome few of the means they made uſe of for eſtabliſhing their plan; and how almoſt all of them have been defeated or converted to better purpoſes, by the vigour of our free conſtitution, and the wiſdom of ſucceſſive parliaments.

THE antient Britiſh church, by whomſoever planted, was a ſtranger to the biſhop of Rome, and all his pretended authority. But the pagan Saxon invaders having driven the profeſſors of chriſtianity to the remoteſt corners of our iſland, their own converſion was afterwards effected by Auguſtin the monk, and other miſſionaries from the court of Rome. This naturally introduced ſome few of the papal corruptions in point of faith and doctrine; but we read of no civil authority claimed by the pope in theſe kingdoms, till the aera of the Norman conqueſt: when the then reigning pontiff having favoured duke William in his projected invaſion, by bleſſing his hoſt and conſecrating his banners, he took that opportunity alſo of eſtabliſhing his ſpiritual encroachments; and was even permitted ſo to do by the policy of the conqueror, in order more effectually to humble the Saxon clergy and aggrandize his Norman prelates; prelates, who, being bred abroad in the doctrine and practice of ſlavery, had contracted a reverence and regard for it, and took a pleaſure in rivetting the chains of a free-born people.

THE moſt ſtable foundation of legal and rational government is a due ſubordination of rank, and a gradual ſcale of authority; and tyranny alſo itſelf is moſt ſurely ſupported by a regular increaſe of deſpotiſm, riſing from the ſlave to the ſultan: with this difference however, that the meaſure of obedience in the one is grounded on the principles of ſociety,

and

and is extended no farther than reaſon and neceſſity will warrant: in the other it is limited only by abſolute will and pleaſure, without permitting the inferior to examine the title upon which it is founded. More effectually therefore to enſlave the conſciences and minds of the people, the Romiſh clergy themſelves paid the moſt implicit obedience to their [106] own ſuperiors or prelates; and they, in their turns, were as blindly devoted to the will of the ſovereign pontiff, whoſe deciſions they held to be infallible, and his authority coextenſive with the chriſtian world. Hence his legates *a latere* were introduced into every kingdom of Europe, his bulles and decretal epiſtles became the rule both of faith and diſcipline, his judgment was the final reſort in all caſes of doubt or difficulty, his decrees were enforced by anathemas and ſpiritual cenſures, he dethroned even kings that were refractory, and denied to whole kingdoms (when undutiful) the exerciſe of chriſtian ordinances, and the benefits of the goſpel of God.

BUT, though the being ſpiritual head of the church was a thing of great ſound, and of greater authority, among men of conſcience and piety, yet the court of Rome was fully apprized that (among the bulk of mankind) power cannot be maintained without property; and therefore it's attention began very early to be riveted upon every method that promiſed pecuniary advantage. The doctrine of purgatory was introduced, and with it the purchaſe of maſſes to redeem the ſouls of the deceaſed. New-fangled offences were created, and indulgences were ſold to the wealthy, for liberty to ſin without danger. The canon law took cognizance of crimes, injoined penance *pro ſalute animae*, and commuted that penance for money. Non-reſidence and pluralities among the clergy, and marriages among the laity related within the ſeventh degree, were ſtrictly prohibited by canon; but diſpenſations were ſeldom denied to thoſe who could afford to buy them. In ſhort, all the wealth of chriſtendom was gradually drained by a thouſand channels, into the coffers of the holy ſee.

THE

THE eſtabliſhment alſo of the feodal ſyſtem in moſt of the governments of Europe, whereby the lands of all private proprietors were declared to be holden of the prince, gave a hint to the court of Rome for uſurping a ſimilar authority over all the preferments of the church; which began firſt in Italy, and gradually ſpread itſelf to England. The pope became a
[107] feodal lord; and all ordinary patrons were to hold their right of patronage, under this univerſal ſuperior. Eſtates held by feodal tenure, being originally gratuitous donations, were at that time denominated *beneficia*: their very name as well as conſtitution was borrowed, and the care of the ſouls of a pariſh thence came to be denominated a *benefice*. Lay fees were conferred by inveſtiture or delivery of corporal poſſeſſion; and ſpiritual benefices, which at firſt were univerſally donative, now received in like manner a ſpiritual inveſtiture, by inſtitution from the biſhop, and induction under his authority. As lands eſcheated to the lord, in defect of a legal tenant, ſo benefices lapſed to the biſhop upon non-preſentation by the patron, in the nature of a ſpiritual eſcheat. The annual tenths collected from the clergy were equivalent to the feodal render, or rent reſerved upon a grant; the oath of canonical obedience was copied from the oath of fealty required from the vaſal by his ſuperior; and the *primer ſeiſins* of our military tenures, whereby the firſt profits of an heir's eſtate were cruelly extorted by his lord, gave birth to as cruel an exaction of firſt-fruits from the beneficed clergy. And the occaſional aids and talliages, levied by the prince on his vaſals, gave a handle to the pope to levy, by the means of his legates *a latere*, peter-pence and other taxations.

AT length the holy father went a ſtep beyond any example of either emperor or feodal lord. He reſerved to himſelf, by his own apoſtolical authority [d], the preſentation to all benefices which became vacant while the incumbent was attending the court of Rome upon any occaſion, or on his journey thither, or back again; and moreover ſuch alſo as became vacant by his promotion to a biſhoprick or abbey: "*etiamſi*

[d] *Extrav. l.* 3. *t.* 2. *c.* 13.

"*ad*

"*ad illa perſonae conſueverint et debuerint per electionem aut* "*quemvis alium modum aſſumi.*" And this laſt, the canoniſts declared, was no detriment at all to the patron, being only like the change of a life in a feodal eſtate by the lord. Diſpenſations to avoid theſe vacancies begat the doctrine of *commendams:* and papal *proviſions* were the previous nomination to ſuch benefices, by a kind of anticipation, before they became actually void: though afterwards indiſcriminately ap- [108] plied to any right of patronage exerted or uſurped by the pope. In conſequence of which the beſt livings were filled by Italian and other foreign clergy, equally unſkilled in and adverſe to the laws and conſtitution of England. The very nomination to biſhopricks, that antient prerogative of the crown, was wreſted from king Henry the firſt, and afterwards from his ſucceſſor king John; and ſeemingly indeed conferred on the chapters belonging to each ſee: but by means of the frequent appeals to Rome, through the intricacy of the laws which regulated canonical elections, was eventually veſted in the pope. And, to ſum up this head with a tranſaction moſt unparalleled and aſtoniſhing in it's kind, pope Innocent III. had at length the effrontery to demand, and king John had the meanneſs to conſent to, a reſignation of his crown to the pope, whereby England was to become for ever St. Peter's patrimony; and the daſtardly monarch re-accepted his ſceptre from the hands of the papal legate, to hold as the vaſal of the holy ſee, at the annual rent of a thouſand marks.

ANOTHER engine ſet on foot, or at leaſt greatly improved, by the court of Rome, was a maſter piece of papal policy. Not content with the ample proviſion of tithes, which the law of the land had given to the parochial clergy, they endeavoured to graſp at the lands and inheritances of the kingdom, and (had not the legiſlature withſtood them) would by this time have probably been maſters of every foot of ground in the kingdom. To this end they introduced the monks of the Benedictine and other rules, men of four and auſtere religion, ſeparated from the world and it's concerns by a vow of perpetual celibacy, yet faſcinating the minds of the people by

by pretences to extraordinary ſanctity, while all their aim was to aggrandize the power and extend the influence of their grand ſuperior the pope. And as, in thoſe times of civil tumult, great rapines and violence were daily committed by overgrown lords and their adherents, they were taught to believe, that founding a monaſtery a little before their deaths would atone for a life of incontinence, diſorder, and bloodſhed. Hence innumerable abbeys and religious houſes were built within a
[109] century after the conqueſt, and endowed, not only with the tithes of pariſhes which were raviſhed from the ſecular clergy, but alſo with lands, manors, lordſhips, and extenſive baronies. And the doctrine inculcated was, that whatever was ſo given to, or purchaſed by, the monks and friars, was conſecrated to God himſelf; and that to alienate or take it away was no leſs than the ſin of ſacrilege.

I MIGHT here have enlarged upon other contrivances, which will occur to the recollection of the reader, ſet on foot by the court of Rome, for effecting an entire exemption of it's clergy from any intercourſe with the civil magiſtrate: ſuch as the ſeparation of the eccleſiaſtical court from the temporal; the appointment of it's judges by merely ſpiritual authority, without any interpoſition from the crown; the excluſive juriſdiction it claimed over all eccleſiaſtical perſons and cauſes; and the *privilegium clericale*, or benefit of clergy, which delivered all clerks from any trial or puniſhment except before their own tribunal. But the hiſtory and progreſs of eccleſiaſtical courts [e], as well as of purchaſes in mortmain [f], have already been fully diſcuſſed in the preceding volumes: and we ſhall have an opportunity of examining at large the nature of the *privilegium clericale* in the progreſs of the preſent book. And therefore I ſhall only obſerve at preſent, that notwithſtanding this plan of pontifical power was ſo deeply laid, and ſo indefatigably purſued by the unwearied politics of the court of Rome through a long ſucceſſion of ages; notwithſtanding it was poliſhed and improved by the united endeavours of a body of men, who engroſſed all the learning of

[e] See Vol. III. pag. 61. [f] See Vol. II. pag. 268.

Europe

Europe for centuries together; notwithſtanding it was firmly and reſolutely executed by perſons the beſt calculated for eſtabliſhing tyranny and deſpotiſm, being fired with a bigoted enthuſiaſm, (which prevailed not only among the weak and ſimple, but even among thoſe of the beſt natural and acquired endowments,) unconnected with their fellow-ſubjects, and totally indifferent what might befal that poſterity to which they bore no endearing relation:—yet it vaniſhed into nothing, when the eyes of the people were a little enlightened, [110] and they ſet themſelves with vigour to oppoſe it. So vain and ridiculous is the attempt to live in ſociety, without acknowledging the obligations which it lays us under; and to affect an entire independence of that civil ſtate, which protects us in all our rights, and gives us every other liberty, that only excepted of deſpiſing the laws of the community.

HAVING thus in ſome degree endeavoured to trace out the original and ſubſequent progreſs of the papal uſurpations in England, let us now return to the ſtatutes of *praemunire*, which were framed to encounter this overgrown yet increaſing evil. King Edward I. a wiſe and magnanimous prince, ſet himſelf in earneſt to ſhake off this ſervile yoke [g]. He would not ſuffer his biſhops to attend a general council, till they had ſworn not to receive the papal benediction. He made light of all papal bulles and proceſſes: attacking Scotland in defiance of one; and ſeiſing the temporalties of his clergy, who under pretence of another refuſed to pay a tax impoſed by parliament. He ſtrengthened the ſtatutes of mortmain; thereby cloſing the great gulph, in which all the lands of the kingdom were in danger of being ſwallowed. And, one of his ſubjects having obtained a bulle of excommunication againſt another, he ordered him to be executed as a traitor, according to the ancient law [h]. And in the thirty-fifth year of his reign was made the firſt ſtatute againſt papal proviſions, being, according to ſir Edward Coke [i], the foundation of all the ſubſequent ſtatutes of *praemunire*, which we rank as an offence

[g] Dav. 83, &c.
[h] Bro. *Abr. tit. Coron.* 115. *Treaſon.* 14. 5 Rep. part 1. fol. 12. 3 Aſſ. 19.
[i] 2 Inſt. 583.

imme-

immediately againſt the king, becauſe every encouragement of the papal power is a diminution of the authority of the crown.

IN the weak reign of Edward the ſecond the pope again endeavoured to encroach, but the parliament manfully withſtood him; and it was one of the principal articles charged againſt that unhappy prince, that he had given allowance to the bulles of the ſee of Rome. But Edward the third was of a temper extremely different: and, to remedy theſe inconveniences firſt by gentle means, he and his nobility wrote an expoſtulation to the pope: but receiving a menacing and contemptuous anſwer, withal acquainting him, that the emperor, (who a few years before at the diet of Nuremberg, *A. D.* 1323, had eſtabliſhed a law againſt proviſions [k],) and alſo the king of France had lately ſubmitted to the holy ſee; the king replied, that if both the Emperor and the French king ſhould take the pope's part, he was ready to give battle to them both, in defence of the liberties of the crown. Hereupon more ſharp and penal laws were deviſed againſt proviſors [l], which enact ſeverally, that the court of Rome ſhall not preſent or collate to any biſhoprick or living in England; and that whoever diſturbs any patron in the preſentation to a living by virtue of a papal proviſion, ſuch proviſor ſhall pay fine and ranſom to the king at his will, and be impriſoned till he renounces ſuch proviſion: and the ſame puniſhment is inflicted on ſuch as cite the king, or any of his ſubjects, to anſwer in the court of Rome. And when the holy ſee reſented theſe proceedings, and pope Urban V. attempted to revive the vaſalage and annual rent to which king John had ſubjected his kingdom, it was unanimouſly agreed by all the eſtates of the realm in parliament aſſembled, 40 Edw. III. that king John's donation was null and void, being without the concurrence of parliament, and contrary to his coronation oath: and all the temporal nobility and commons engaged, that if the pope ſhould endeavour by proceſs or otherwiſe to

[111]

[k] Mod. Un. Hiſt. xxix. 293.

[l] Stat. 25 Edw. III. ſt. 6. 27 Edw. III. ſt. 1. c. 1. 38 Edw. III. ſt. 1. c. 4. & ſt. 2. c. 1, 2, 3, 4.

maintain theſe uſurpations, they would reſiſt and withſtand him with all their power [m].

IN the reign of Richard the ſecond, it was found neceſſary to ſharpen and ſtrengthen theſe laws, and therefore it was enacted by ſtatutes 3 Ric. II. c. 3. and 7 Ric. II. c. 12. firſt, that no alien ſhould be capable of letting his benefice to farm: in order to compel ſuch, as had crept in, at leaſt to reſide on their preferments: and, afterwards, that no alien ſhould be capable to be preſented to any eccleſiaſtical preferment, under the penalty of the ſtatutes of proviſors. By the ſtatute 12 Ric. II. c. 15. all liegemen of the king, accepting of a living by any foreign proviſion, are put out of the king's protection, and the benefice made void. To which the ſtatute 13 Ric. II. ſt. 2. c. 2. adds baniſhment and forfeiture of lands and goods: and by c. 3. of the ſame ſtatute, any perſon bringing over any citation or excommunication from beyond ſea, on account of the execution of the foregoing ſtatutes of proviſors, ſhall be impriſoned, forfeit his goods and lands, and moreover ſuffer pain of life and member. [112]

IN the writ for the execution of all theſe ſtatutes the words *praemunire facias*, being (as we ſaid) uſed to command a citation of the party, have denominated in common ſpeech not only the writ, but the offence itſelf of maintaining the papal power, by the name of *praemunire*. And accordingly the next ſtatute I ſhall mention, which is generally referred to by all ſubſequent ſtatutes, is uſually called the ſtatute of *praemunire*. It is the ſtatute 16 Ric. II. c. 5. which enacts, that whoever procures at Rome, or elſewhere, any tranſlations, proceſſes, excommunications, bulles, inſtruments, or other things which touch the king, againſt him, his crown, and realm, and all perſons aiding and aſſiſting therein, ſhall be put out of the king's protection, their lands and goods forfeited to the king's uſe, and they ſhall be attached by their bodies to anſwer to the king and his council: or proceſs of

[m] Seld. *in Flet.* 10. 4.

praemunire facias ſhall be made out againſt them, as in other caſes of proviſors.

By the ſtatute 2 Hen. IV. c. 3. all perſons who accept any proviſion from the pope, to be exempt from canonical obedience to their proper ordinary, are alſo ſubjected to the penalties of *praemunire*. And this is the laſt of our antient ſtatutes touching this offence; the uſurped civil power of the biſhop of Rome being pretty well broken down by theſe ſtatutes, as his uſurped religious power was in about a century afterwards; the ſpirit of the nation being ſo much raiſed
[113] againſt foreigners, that about this time, in the reign of Henry the fifth, the alien priories, or abbeys for foreign monks, were ſuppreſſed, and their lands given to the crown. And no farther attempts were afterwards made in ſupport of theſe foreign juriſdictions.

A LEARNED writer, before referred to, is therefore greatly miſtaken, when he ſays [n], that in Henry the ſixth's time the archbiſhop of Canterbury and other biſhops offered to the king a large ſupply, if he would conſent that all laws againſt proviſors, and eſpecially the ſtatute 16 Ric. II. might be repealed; but that this motion was rejected. This account is incorrect in all it's branches. For, firſt, the application, which he probably means, was made not by the biſhops only, but by the unanimous conſent of a provincial ſynod, aſſembled in 1439, 18 Hen. VI. that very ſynod which at the ſame time refuſed to confirm and allow a papal bulle, which then was laid before them. Next, the purport of it was not to procure a repeal of the ſtatutes againſt proviſors, or that of Richard II. in particular; but to requeſt that the penalties thereof, which by a forced conſtruction were applied to all that ſued in the ſpiritual, and even in many temporal, courts of this realm, might be turned againſt the proper objects only; thoſe who appealed to Rome, or to any foreign juriſdictions: the tenor of the petition being, "that thoſe penal-
" ties ſhould be taken to extend only to thoſe that com-

[n] Dav. 96.

" menced

"menced any ſuits or procured any writs or public inſtruments "at Rome, or elſewhere out of England; and that no one "ſhould be proſecuted upon that ſtatute for any ſuit in the "ſpiritual courts or lay juriſdictions of this kingdom." Laſtly, the motion was ſo far from being rejected, that the king promiſed to recommend it to the next parliament, and in the mean time that no one ſhould be moleſted upon this account. And the clergy were ſo ſatisfied with their ſucceſs, that they granted to the king a whole tenth upon this occaſion [a].

[114]

AND indeed ſo far was the archbiſhop, who preſided in this ſynod, from countenancing the uſurped power of the pope in this realm, that he was ever a firm oppoſer of it. And, particularly in the reign of Henry the fifth, he prevented the king's uncle from being then made a cardinal, and legate *a latere* from the pope; upon the mere principle of it's being within the miſchief of papal proviſions, and derogatory from the liberties of the Engliſh church and nation. For, as he expreſſed himſelf to the king in his letter upon that ſubject, "he was bound to oppoſe it by his ligeance, "and alſo to quit himſelf to God, and the church of this "land, of which God and the king had made him governor." This was not the language of a prelate addicted to the ſlavery of the ſee of Rome; but of one, who was indeed of principles ſo very oppoſite to the papal uſurpations, that in the year preceding this ſynod, 17 Hen. VI. he refuſed to conſecrate a biſhop of Ely, that was nominated by pope Eugenius IV. A conduct quite conſonant to his former behaviour, in 6 Hen. VI. when he refuſed to obey the commands of pope Martin V. who had required him to exert his endeavours to repeal the ſtatute of *praemunire* ("*execrabile illud ſtatutum*," as the holy father phraſes it); which refuſal ſo far exaſperated the court of Rome againſt him, that at length the pope iſſued a bulle to ſuſpend him from his office and authority, which the archbiſhop diſregarded, and appealed to a general council. And ſo ſenſible were the nation of their primate's merit, that

[a] Wilk. *Concil. Mag. Brit.* III. 533.

the lords ſpiritual and temporal, and alſo the univerſity of Oxford, wrote letters to the pope in his defence; and the houſe of commons addreſſed the king, to ſend an embaſſador forthwith to his holineſs, on behalf of the archbiſhop, who had incurred the diſpleaſure of the pope for oppoſing the exceſſive power of the court of Rome [p].

[115] THIS then is the original meaning of the offence, which we call *praemunire*; viz. introducing a foreign power into this land, and creating *imperium in imperio*, by paying that obedience to papal proceſs, which conſtitutionally belonged to the king alone, long before the reformation in the reign of Henry the eighth: at which time the penalties of *praemunire* were indeed extended to more papal abuſes than before; as the kingdom then entirely renounced the authority of the ſee of Rome, though not all the corrupted doctrines of the Roman church. And therefore by the ſeveral ſtatutes of 24 Hen. VIII. c. 12. and 25 Hen. VIII. c. 19 & 21. to appeal to Rome from any of the king's courts, which (though illegal before) had at times been connived at; to ſue to Rome for any licence or diſpenſation; or to obey any proceſs from thence; are made liable to the pains of *praemunire*. And, in order to reſtore to the king in effect the nomination of vacant biſhopricks, and yet keep up the eſtabliſhed forms, it is enacted by ſtatute 25 Hen. VIII. c. 20. that if the dean and chapter refuſe to elect the perſon named by the king, or any archbiſhop or biſhop to confirm or conſecrate him, they ſhall fall within the penalties of the ſtatutes of *praemunire*. Alſo by ſtatute 5 Eliz. c. 1. to refuſe the oath of ſupremacy will incur the pains of *praemunire*; and to defend the pope's juriſdiction in this realm, is a *praemunire* for the firſt offence, and high treaſon for the ſecond. So too, by ſtatute 13 Eliz.

[p] See Wilk. *Concil. Mag. Br.* Vol. III. *paſſim*. and Dr. Duck's life of archbiſhop Chicheley, who was the prelate here ſpoken of, and the munificent founder of All Soul's college in Oxford: in vindication of whoſe memory the author hopes to be excuſed this digreſſion; if indeed it be a digreſſion, to ſhew how contrary to the ſentiments of ſo learned and pious a prelate, even in the days of popery, thoſe uſurpations were, which the ſtatutes of *praemunire* and proviſors were made to reſtrain.

c. 2. to import any *agnus Dei*, croſſes, beads, or other ſuperſtitious things pretended to be hallowed by the biſhop of Rome, and tender the ſame to be uſed; or to receive the ſame with ſuch intent, and not diſcover the offender; or if a juſtice of the peace, knowing thereof, ſhall not within fourteen days declare it to a privy counſellor; they all incur a *praemunire*. But importing or ſelling maſs-books, or other popiſh books, is by ſtatute 3 Jac. I. c. 5. § 25. only liable to a penalty of forty ſhillings. Laſtly, to contribute to the maintenance of a jeſuit's college, or any popiſh ſeminary whatever, beyond ſea; or any perſon in the ſame; or to contribute to the maintenance of any jeſuit or popiſh prieſt in England, is by ſtatute 27 Eliz. c. 2. made liable to the penalties of *praemunire*.

THUS far the penalties of *praemunire* ſeem to have kept [116] within the proper bounds of their original inſtitution, the depreſſing the power of the pope: but, they being pains of no inconſiderable conſequence, it has been thought fit to apply the ſame to other heinous offences; ſome of which bear more, and ſome leſs relation to this original offence, and ſome no relation at all.

THUS, 1. By the ſtatute 1 & 2 Ph. & Mar. c. 8. to moleſt the poſſeſſors of abbey lands granted by parliament to Henry the eighth, and Edward the ſixth, is a *praemunire*. 2. So likewiſe is the offence of acting as a broker or agent in any uſurious contract, when above ten *per cent.* intereſt is taken, by ſtatute 13 Eliz. c. 10. 3. To obtain any ſtay of proceedings, other than by arreſt of judgment or writ of error, in any ſuit for a monopoly, is likewiſe a *praemunire*, by ſtatute 21 Jac. I. c. 3. 4. To obtain an excluſive patent for the ſole making or importation of gunpowder or arms, or to hinder others from importing them, is alſo a *praemunire* by two ſtatutes: the one 16 Car. 1. c. 21. the other 1 Jac. II. c. 8. 5. On the abolition, by ſtatute 12 Car. II. c. 24. of purveyances[q], and the prerogative of pre-emption, or taking any victual, beaſts, or goods for the king's uſe, at a ſtated price,

[q] See vol. I. pag. 287.

without conſent of the proprietor, the exertion of any ſuch power for the future was declared to incur the penalties of *praemunire*. 6. To aſſert, maliciouſly and adviſedly, by ſpeaking or writing, that both or either houſe of parliament have a legiſlative authority without the king, is declared a *praemunire* by ſtatute 13 Car. II. c. 1. 7. By the *habeas corpus* act alſo, 31 Car. II. c. 2. it is a *praemunire*, and incapable of the king's pardon, beſides other heavy penalties[r], to ſend any ſubject of this realm a priſoner into parts beyond the ſeas. 8. By the ſtatute 1 W. & M. ſt. 1. c. 8. perſons of eighteen years of age, refuſing to take the new oaths of allegiance, as well as ſupremacy, upon tender by the proper magiſtrate, are ſubject to the penalties of a *praemunire* (5); and by ſtatute
[117] 7 & 8 W. III. c. 24. ſerjeants, counſellors, proctors, attorneys, and all officers of courts, practiſing without having taken the oaths of allegiance and ſupremacy, and ſubſcribed the declaration againſt popery, are guilty of a *praemunire*, whether the oaths be tendered or no. 9. By the ſtatute 6 Ann. c. 7. to aſſert maliciouſly and directly, by preaching, teaching, or adviſed ſpeaking, that the then pretended prince of Wales, or any perſon other than according to the acts of ſettlement and union, hath any right to the throne of theſe kingdoms; or that the king and parliament cannot make laws to limit the deſcent of the crown; ſuch preaching, teaching, or adviſed ſpeaking is a *praemunire*: as writing, printing, or publiſhing the ſame doctrines amounted, we may remember, to high treaſon. 10. By ſtatute 6 Ann. c. 23. if the aſſembly of peers of Scotland, convened to elect their ſixteen repreſentatives in the Britiſh parliament, ſhall preſume to treat of any other matter ſave only the election, they incur the penalties of a *praemunire*. 11. The ſtatute 6 Geo. I. c. 18. (enacted in the year after the infamous ſouth ſea project had

[r] See vol. I. pag. 138. vol. III. pag. 137.

(5) By the 31 Geo. III. c. 32. ſ. 18. it is enacted, that no perſon ſhall be ſummoned to take the oath of ſupremacy, or make the declaration againſt tranſubſtantiation, or be proſecuted for not obeying a ſummons for that purpoſe.

beggared

beggared half the nation) makes all unwarrantable undertakings by unlawful ſubſcriptions, then commonly known by the names of bubbles, ſubject to the penalties of a *praemunire*. 12. The ſtatute 12 Geo. III. c. 11. ſubjects to the penalties of the ſtatute of *praemunire* all ſuch as knowingly and wilfully ſolemnize, aſſiſt, or are preſent at, any forbidden marriage of ſuch of the deſcendants of the body of king George II. as are by that act prohibited to contract matrimony without the conſent of the crown [s].

HAVING thus inquired into the nature and ſeveral ſpecies of *praemunire*, it's puniſhment may be gathered from the foregoing ſtatutes, which are thus ſhortly ſummed up by ſir Edward Coke [t]: "that, from the conviction, the defendant "ſhall be out of the king's protection, and his lands and te-"nements, goods and chattels, forfeited to the king: and "that his body ſhall remain in priſon *at the king's pleaſure*; "or (as other authorities have it) *during life*:" both which [118] amount to the ſame thing; as the king by his prerogative may any time remit the whole, or any part, of the puniſhment, except in the caſe of tranſgreſſing the ſtatute of *habeas corpus*. Theſe forfeitures here inflicted, do not (by the way) bring this offence within our former definition of felony; being inflicted by particular ſtatutes, and not by the common law. But ſo odious, ſir Edward Coke adds, was this offence of *praemunire*, that a man that was attainted of the ſame might have been ſlain by any other man without danger of law: becauſe it was provided by law [u], that any man might do to him as to the king's enemy; and any man may lawfully kill an enemy. However, the poſition itſelf, that it is at any time lawful to kill an enemy, is by no means tenable: it is only lawful, by the law of nature and nations, to kill him in the heat of battle, or for neceſſary ſelf-defence. And to obviate ſuch ſavage and miſtaken notions [x], the ſtatute 5 Eliz. c. 1. provides, that it ſhall not be lawful to kill any perſon

[s] See book I. ch. 4.
[t] 1 Inſt. 129.
[u] 1 Hawk. 199.
[w] Stat. 25 Edw. III ſt. 5. c. 22.
[x] Bro. *Abr.* t. *corone*, 296.

attainted in a *praemunire*, any law, ſtatute, opinion, or expoſition of law to the contrary notwithſtanding. But ſtill ſuch delinquent, though protected as a part of the public from public wrongs, can bring no action for any private injury, how atrocious ſoever, being ſo far out of the protection of the law, that it will not guard his civil rights, nor remedy any grievance which he as an individual may ſuffer. And no man, knowing him to be guilty, can with ſafety give him comfort, aid, or relief[y] (6).

[y] 1 Hawk. P. C. 55.

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(6) The terrible penalties of a *praemunire* are denounced by a great variety of ſtatutes, yet proſecutions upon a *praemunire* are unheard-of in our courts.

There is only one inſtance of ſuch a proſecution in the State Trials, in which caſe the penalties of a *praemunire* were inflicted upon ſome perſons, for refuſing to take the oath of allegiance in the reign of Charles the ſecond. *Harg. St. Tr.* 2 vol. 463.

CHAPTER THE NINTH.

OF MISPRISIONS AND CONTEMPTS, AFFECTING THE KING AND GOVERNMENT.

THE fourth ſpecies of offences more immediately againſt the king and government, are intitled miſpriſions and contempts.

MISPRISIONS (a term derived from the old French, *meſpris*, a neglect or contempt) are, in the acceptation of our law, generally underſtood to be all ſuch high offences as are under the degree of capital, but nearly bordering thereon: and it is ſaid, that a miſpriſion is contained in every treaſon and felony whatſoever; and that, if the king ſo pleaſe, the offender may be proceeded againſt for the miſpriſion only [a]. And upon the ſame principle, while the juriſdiction of the ſtar-chamber ſubſiſted, it was held that the king might remit a proſecution for treaſon, and cauſe the delinquent to be cenſured in that court, merely for a high miſdemeſnor: as happened in the caſe of Roger earl of Rutland, in 43 Eliz. who was concerned in the earl of Eſſex's rebellion [b]. Miſpriſions are generally divided into two ſorts; negative, which conſiſt in the concealment of ſomething which ought to be revealed; and poſitive, which conſiſt in the commiſſion of ſomething which ought not to be done.

[a] Yearb. 2 *Ric. III.* 10. Staundf. P.C. 37. Kel. 71. 1 Hal. P. C. 374. 1 Hawk. P. C. 55, 56.

[b] Hudſon of the court of ſtar-chamber. *MS. in Muſ. Brit.*

I. OF

I. OF the firſt, or negative kind, is what is called *miſpriſion of treaſon*; conſiſting in the bare knowlege and concealment of treaſon, without any degree of aſſent thereto: for any aſſent makes the party a principal traitor; as indeed the concealment, which was conſtrued aiding and abetting, did at the common law: in like manner as the knowlege of a plot againſt the ſtate, and not revealing it, was a capital crime at Florence and other ſtates of Italy [c]. But it is now enacted by the ſtatute 1 & 2 Ph. & Mar. c. 10. that a bare concealment of treaſon ſhall be only held a miſpriſion. This concealment becomes criminal, if the party apprized of the treaſon does not, as ſoon as conveniently may be, reveal it to ſome judge of aſſiſe or juſtice of the peace [d]. But if there be any probable circumſtances of aſſent, as if one goes to a treaſonable meeting, knowing before-hand that a conſpiracy is intended againſt the king; or, being in ſuch company once by accident, and having heard ſuch treaſonable conſpiracy, meets the ſame company again, and hears more of it, but conceals it; this is an implied aſſent in law, and makes the concealer guilty of actual high treaſon [e].

THERE is alſo one poſitive miſpriſion of treaſon, created ſo by act of parliament. The ſtatute 13 Eliz. c. 2. enacts, that thoſe who forge foreign coin, not current in this kingdom, their aiders, abettors, or procurers, ſhall all be guilty of miſpriſion of treaſon. For, though the law would not put foreign coin upon quite the ſame footing as our own; yet, if the circumſtances of trade concur, the falſifying it may be attended with conſequences almoſt equally pernicious to the public; as the counterfeiting of Portugal money would be at preſent: and therefore the law has made it an offence juſt below capital, and that is all. For the puniſhment of miſpriſion of treaſon is loſs of the profits of lands during life, forfeiture of goods, and impriſonment during life [f]. Which total forfeiture of the goods was originally inflicted while

[c] Guicciard. Hiſt. b. 3 & 13.
[d] 1 Hal. P. C. 372.
[e] 1 Hawk. P. C. 56.
[f] 1 Hal. P. C. 374.

the

the offence amounted to principal treaſon, and of courſe included in it a felony, by the common law; and therefore is no exception to the general rule laid down in a former chapter[g], that wherever an offence is puniſhed by ſuch total forfeiture it is felony at the common law.

MISPRISION *of felony* is alſo the concealment of a felony which a man knows, but never aſſented to; for if he aſſented, this makes him either principal or acceſſory. And the puniſhment of this, in a public officer, by the ſtatute Weſtm. 1. 3 Edw. I. c. 9. is impriſonment for a year and a day; in a common perſon, impriſonment for a leſs diſcretionary time; and, in both, fine and ranſom at the king's pleaſure: which pleaſure of the king muſt be obſerved, once for all, not to ſignify any extrajudicial will of the ſovereign, but ſuch as is declared by his repreſentatives, the judges in his courts of juſtice; "*voluntas regis in curia, non in camera*[h]."

THERE is alſo another ſpecies of negative miſpriſions: namely, the *concealing of treaſure-trove*, which belongs to the king or his grantees by prerogative royal: the concealment of which was formerly puniſhable by death[i]; but now only by fine and impriſonment[j].

II. MISPRISIONS, which are merely poſitive, are generally denominated *contempts* or *high miſdemeſnors*; of which

1. THE firſt and principal is the *mal-adminiſtration* of ſuch high officers, as are in public truſt and employment. This is uſually puniſhed by the method of parliamentary impeachment: wherein ſuch penalties, ſhort of death, are inflicted, as to the wiſdom of the houſe of peers ſhall ſeem proper; conſiſting uſually of baniſhment, impriſonment, fines, or perpetual diſability. Hitherto alſo may be referred the

[g] See pag. 94.
[h] 1 Hal. P. C. 375.
[i] Glanv. *l.* 1. *c.* 2.
[j] 3 Inſt. 133.

offence

offence of *imbezzling the public money*, called among the Romans *peculatus*, which the Julian law punished with death in a magistrate, and with deportation, or banishment, in a private person [k]. With us it is not a capital crime, but subjects the committer of it to a discretionary fine and imprisonment. Other misprisions are, in general, such contempts of the executive magistrate, as demonstrate themselves by some arrogant and undutiful behaviour towards the king and government. These are

2. CONTEMPTS against the king's *prerogative*. As, by refusing to assist him for the good of the public; either in his councils, by advice, if called upon; or in his wars, by personal service for defence of the realm, against a rebellion or invasion [l]. Under which class may be ranked the neglecting to join the *posse comitatus*, or power of the county, being thereunto required by the sheriff or justices, according to the statute 2 Hen. V. c. 8. which is a duty incumbent upon all that are fifteen years of age, under the degree of nobility, and able to travel [m]. Contempts against the prerogative may also be, by preferring the interests of a foreign potentate to those of our own, or doing or receiving any thing that may create an undue influence in favour of such entrinsic power; as, by taking a pension from any foreign prince without the consent of the king [n]. Or, by disobeying the king's lawful commands; whether by writs issuing out of his courts of justice, or by a summons to attend his privy council, or by letters from the king to a subject commanding him to return from beyond the seas, (for disobedience to which his lands shall be seised till he does return, and himself afterwards punished,) or by his writ of *ne exeat regnum*, or proclamation, commanding the subject to stay at home [o]. Disobedience to any of these commands is a high misprision and contempt; and so, lastly, is disobedience to any act of parliament, where no particular penalty is assigned; for then it is punishable, like the rest of

[k] *Inst.* 4. 18. 9.
[l] 1 Hawk. P. C. 59.
[m] Lamb. Elr. 315.
[n] 3 Inst. 144.
[o] See Vol. I. pag. 266.

theſe contempts, by fine and impriſonment, at the diſcretion of the king's courts of juſtice [p].

3. CONTEMPTS and miſpriſions againſt the king's *perſon* and *government*, may be by ſpeaking or writing againſt them, curſing or wiſhing him ill, giving out ſcandalous ſtories concerning him, or doing any thing that may tend to leſſen him in the eſteem of his ſubjects, may weaken his government, or, may raiſe jealouſies between him and his people. It has been alſo held an offence of this ſpecies to drink to the pious memory of a traitor; or for a clergyman to abſolve perſons at the gallows, who there perſiſt in the treaſons for which they die: theſe being acts which impliedly encourage rebellion. And for this ſpecies of contempt a man may not only be fined and impriſoned, but ſuffer the pillory or other infamous corporal puniſhment [q]: in like manner as, in the antient German empire, ſuch perſons as endeavoured to ſow ſedition, and diſturb the public tranquillity, were condemned to become the objects of public notoriety and deriſion, by carrying a dog upon their ſhoulders from one great town to another. The emperors Otho I. and Frederic Barbaroſſa inflicted this puniſhment on noblemen of the higheſt rank [r].

4. CONTEMPTS againſt the king's *title*, not amounting to treaſon or *praemunire*, are the denial of his right to the crown in common and unadviſed diſcourſe; for, if it be by adviſedly ſpeaking, we have ſeen [s] that it amounts to a *praemunire*. This heedleſs ſpecies of contempt is however puniſhed by our law with fine and impriſonment. Likewiſe if any perſon ſhall in any wiſe hold, affirm, or maintain, that the common laws of this realm, not altered by parliament, ought not to direct the right of the crown of England; this is a miſdemeſnor, by ſtatute 13 Eliz. c. 1. and puniſhable with forfeiture of goods and chattels. A contempt may alſo ariſe from refuſing or neglecting to take the oaths, appointed by ſtatute for the better ſecuring the government; and yet

[p] 1 Hawk. P. C. 60.
[q] *Ibid.*
[r] Mod. Un. Hiſt. xxix 28 219.
[s] See pag. 91.

acting

acting in a public office, place of truſt, or other capacity, for which the ſaid oaths are required to be taken; *viz.* thoſe of allegiance, ſupremacy, and abjuration; which muſt be taken within ſix calendar months after admiſſion. The penalties for this contempt, inflicted by ſtatute 1 Geo. I. ſt. 2. c. 13. are very little, if any thing, ſhort of thoſe of a *praemunire*: being an incapacity to hold the ſaid offices, or any other; to proſecute any ſuit; to be guardian or executor; to take any legacy or deed of gift; and to vote at any election for members of parliament: and after conviction the offender ſhall alſo forfeit 500*l.* to him or them that will ſue for the ſame (1). Members on the foundation of any college in the two univerſities, who by this ſtatute are bound to take the oaths, muſt alſo regiſter a certificate thereof in the college regiſter, within one month after; otherwiſe, if the electors do not remove him, and elect another within twelve months, or after, the king may nominate a perſon to ſucceed him by his great ſeal or ſign manual. Beſides thus taking the oaths for offices, any two juſtices of the peace may by the ſame ſtatute ſummon, and tender the oaths to, any perſon whom they ſhall ſuſpect to be diſaffected; and every perſon refuſing the ſame, who is properly called a non-juror, ſhall be adjudged a popiſh recuſant convict, and ſubject to the ſame penalties that were mentioned in a former chapter[t]; which in the end may amount to the alternative of abjuring the realm, or ſuffering death as a felon (2).

5. CONTEMPTS againſt the king's *palaces* or *courts of juſtice* have been always looked upon as high miſpriſions: and by the antient law, before the conqueſt, fighting in the king's palace, or before the king's judges, was puniſhed with death[v]. So too, in the old Gothic conſtitution, there were many places privileged by law, *quibus major revetentia et ſe-*

[t] See pag. 55. [v] 3 Inſt. 140. *LL. Alured. cap.* 7, & 34.

(1) See page 59. note 3. (2) See page 116. note 1.

curitas debetur, ut templa et judicia, quae ſancta habebantur, —artes et aula regis,—denique locus quilibet praeſente aut adventante rege[u]. And at preſent, with us, by the ſtatute 33 Hen. VIII. c. 12. malicious ſtriking in the king's [125] palace, wherein his royal perſon reſides, whereby blood is drawn, is puniſhable by perpetual impriſonment, and fine at the king's pleaſure; and alſo with loſs of the offender's right hand, the ſolemn execution of which ſentence is preſcribed in the ſtatute at length(3).

But *ſtriking* in the king's ſuperior courts of juſtice, in Weſtminſter-hall, or at the aſſiſes, is made ſtill more penal than even in the king's palace. The reaſon ſeems to be, that thoſe courts being antiently held in the king's palace, and before the king himſelf, ſtriking there included the former contempt againſt the king's palace, and ſomething more; *viz.* the diſturbance of public juſtice. For this reaſon, by the antient common law before the conqueſt[w], ſtriking in the king's courts of juſtice, or drawing a ſword therein, was a capital felony: and our modern law retains ſo much of the antient ſeverity as only to exchange the loſs

[u] Stiernh. *de jure Goth. l.* 3. *c.* 3.
[w] *LL. Inae. c.* 6. *LL. Canut. c.* 56. *LL. Alured. c.* 7.

(3) Mr. Hargrave has given in the 11th vol. of the State Trials, p. 16. an extract from Stowe's Annals, containing a very curious account of the circumſtances of the trial of ſir Edmund Knevet, who was proſecuted upon this ſtatute, ſoon after it was enacted: "for which offence he was not onely judged to looſe his hand, but "alſo his body to remaine in priſon, and his lands and goods at "the king's pleaſure. Then the ſaid ſir Edmund Knevet deſired "that the king, of his benigne grace, would pardon him of his "right hand, and take the left: for (quoth he) if my right be "ſpared, I may hereafter doe ſuch good ſervice to his grace, as "ſhall pleaſe him to appoint. Of this ſubmiſſion and requeſt the "juſtices forthwith informed the king, who of his goodneſs, con-"ſidering the gentle heart of the ſaid Edmund, and the good re-"port of lords and ladies, granted him pardon, that he ſhould looſe "neither hand, land, nor goods, but ſhould go free at liberty."

of

of life for the loſs of the offending limb. Therefore a ſtroke or blow in ſuch a court of juſtice, whether blood be drawn or not, or even aſſaulting a judge ſitting in the court, by drawing a weapon, without any blow ſtruck, is puniſhable with the loſs of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of his lands during life [x]. A *reſcue* alſo of a priſoner from any of the ſaid courts, without ſtriking a blow, is puniſhed with perpetual impriſonment, and forfeiture of goods, and of the profits of lands during life [y]: being looked upon as an offence of the ſame nature with the laſt; but only, as no blow is actually given, the amputation of the hand is excuſed. For the like reaſon an affray, or riot, near the ſaid courts, but out of their actual view, is puniſhed only with fine and impriſonment [z].

[126] NOT only ſuch as are guilty of an actual violence, but of threatening or reproachful words to any judge ſitting in the courts, are guilty of a high miſpriſion, and have been puniſhed with large fines, impriſonment, and corporal puniſhment [a]. And, even in the inferior courts of the king, an affray, or contemptuous behaviour, is puniſhable with a fine by the judges there ſitting; as by the ſteward in a court-leet, or the like [b].

LIKEWISE all ſuch, as are guilty of any injurious treatment to thoſe who are immediately under the protection of a court of juſtice, are puniſhable by fine and impriſonment: as if a man aſſaults or threatens his adverſary for ſuing him, a counſellor or attorney for being employed againſt him, a juror for his verdict, or a gaoler or other miniſterial officer for keeping him in cuſtody, and properly executing his duty [c]: which offences, when they proceeded farther than bare threats, were puniſhed in the Gothic conſtitutions with exile and forfeiture of goods [d].

[x] Staund. P. C. 38. 3 Inſt. 140, 141.
[y] 1 Hawk. P. C. 57.
[z] Cro. Car. 373.
[a] *Ibid.* 503.
[b] 1 Hawk. P. C. 58.
[c] 3 Inſt. 141, 142.
[d] Stiernh. *de jure Goth.* l. 3. c. 3.

LASTLY,

Lastly, to endeavour to diſſuade a witneſs from giving evidence; to diſcloſe an examination before the privy council; or, to adviſe a priſoner to ſtand mute (all of which are impediments of juſtice); are high miſpriſions, and contempts of the king's courts, and puniſhable by fine and impriſonment. And antiently it was held, that if one of the grand jury diſcloſed to any perſon indicted the evidence that appeared againſt him, he was thereby made acceſſory to the offence, if felony; and in treaſon, a principal. And at this day it is agreed, that he is guilty of a high miſpriſion [e], and liable to be fined and impriſoned [f] (4).

[e] See Bar. 212. 27 Aſſ. pl. 44. § 4. fol. 138.
[f] 1 Hawk. P. C. 59.

(4) A few years ago at York a gentleman of the grand jury heard a witneſs ſwear in court, upon the trial of a priſoner, directly contrary to the evidence which he had given before the grand jury. He immediately communicated the circumſtance to the judge, who, upon conſulting the judge in the other court, was of opinion that public juſtice in this caſe required that the evidence which the witneſs had given before the grand jury ſhould be diſcloſed, and the witneſs was committed for perjury to be tried upon the teſtimony of the gentlemen of the grand jury. It was held the object of this concealment was only to prevent the teſtimony produced before them from being counteracted by ſubornation of perjury on the part of the perſons againſt whom bills were found. This is a privilege which may be waived by the crown. *See p.* 303. (z. 1,) *poſt.*

CHAPTER THE TENTH.

OF OFFENCES AGAINST PUBLIC JUSTICE.

THE order of our diſtribution will next lead us to take into conſideration ſuch crimes and miſdemeſnors a more eſpecially affect the *common-wealth*, or public polity of the kingdom: which however, as well as thoſe which are peculiarly pointed againſt the lives and ſecurity of private ſubjects, are alſo offences againſt the king, as the *pater-familias* of the nation: to whom it appertains by his regal office to protect the community, and each individual therein, from every degree of injurious violence, by executing thoſe laws, which the people themſelves in conjunction with him have enacted; or at leaſt have conſented to, by an agreement either expreſsly made in the perſons of their repreſentatives, or by a tacit and implied conſent preſumed and proved by immemorial uſage.

THE ſpecies of crimes, which we have now before us, is ſubdivided into ſuch a number of inferior and ſubordinate claſſes, that it would much exceed the bounds of an elementary treatiſe, and be inſupportably tedious to the reader, were I to examine them all minutely, or with any degree of critical accuracy. I ſhall therefore confine myſelf principally to general definitions or deſcriptions of this great variety of offences, and to the puniſhments inflicted by law for each particular offence; with now and then a few incidental obſervations: referring the ſtudent for more particulars to other voluminous authors; who have treated of theſe ſubjects

with greater precision and more in detail, than is consistent with the plan of these commentaries.

THE crimes and misdemesnors that more especially affect the common-wealth, may be divided into five species; *viz.* offences against public *justice*, against the public *peace*, against [128] public *trade*, against the public *health*, and against the public *police* or *oeconomy*: of each of which we will take a cursory view in their order.

FIRST then, of offences against public *justice*: some of which are felonious, whose punishment may extend to death; others only misdemesnors. I shall begin with those that are most penal, and descend gradually to such as are of less malignity.

1. IMBEZZLING or vacating *records*, or falsifying certain other proceedings in a court of judicature, is a felonious offence against public justice. It is enacted by statute 8 Hen. VI. c. 12. that if any clerk, or other person, shall wilfully take away, withdraw, or avoid any record, or process in the superior courts of justice in Westminster-hall, by reason whereof the judgment shall be reversed or not take effect; it shall be felony not only in the principal actors, but also in their procurers and abettors. And this may be tried either in the king's bench or common pleas, by a jury *de medietate*; half officers of any of the superior courts, and the other half common jurors. Likewise by statute 21 Jac. I. c. 26. to acknowledge any fine, recovery, deed enrolled, statute, recognizance, bail, or judgment, in the name of another person not privy to the same, is felony without benefit of clergy. Which law extends only to proceedings in the courts themselves: but by statute 4 W. & M. c. 4. to personate any other person (as bail) before any judge of assize or other commissioner authorized to take bail in the country, is also felony. For no man's property would be safe, if records might be suppressed or falsified, or persons names be falsely usurped in courts, or before their public officers.

2. To prevent abuſes by the extenſive power, which the law is obliged to repoſe in gaolers, it is enacted by ſtatute 14 Edw. III. c. 10. that if any *gaoler* by too great dureſs of impriſonment makes any priſoner, that he hath in ward, be-
[129] come an *approver* or an *appellor* againſt his will; that is, as we ſhall ſee hereafter, to accuſe and turn evidence againſt ſome other perſon; it is felony in the gaoler. For, as ſir Edward Coke obſerves [a], it is not lawful to induce or excite any man even to a juſt accuſation of another; much leſs to do it by dureſs of impriſonment; and leaſt of all by a gaoler, to whom the priſoner is committed for ſafe cuſtody.

3. A THIRD offence againſt public juſtice is *obſtructing* the execution of lawful *proceſs*. This is at all times an offence of a very high and preſumptuous nature; but more particularly ſo, when it is an obſtruction of an arreſt upon criminal proceſs. And it hath been holden, that the party oppoſing ſuch arreſt becomes thereby *particeps criminis*; that is, an acceſſory in felony, and a principal in high treaſon [b]. Formerly one of the greateſt obſtructions to public juſtice, both of the civil and criminal kind, was the multitude of pretended privileged places, where indigent perſons aſſembled together to ſhelter themſelves from juſtice, (eſpecially in London and Southwark) under the pretext of their having been ancient palaces of the crown, or the like [c]: all of which ſanctuaries for iniquity are now demoliſhed, and the oppoſing of any proceſs therein is made highly penal, by the ſtatutes 8 & 9 Will. III. c. 27, 9 Geo. I. c. 28, and 11 Geo. I. c. 22, which enact, that perſons oppoſing the execution of any proceſs in ſuch pretended privileged places within the bills of mortality, or abuſing any officer in his endeavours to execute his duty therein, ſo that he receives bodily hurt, ſhall be guilty of felony, and tranſported for ſeven years: and perſons in diſguiſe, joining in or abetting any riot or tumult on ſuch account, or oppoſing any proceſs, or aſſaulting and abuſing

[a] 3 Inſt. 91.
[b] 2 Hawk. P. C. 121.
[c] Such as *White-Friers*, and its environs; the *Savoy*; and the *Mint* in Southwark.

any

any officer executing or for having executed the same, shall be felons without benefit of clergy.

4. AN *escape* of a person arrested upon criminal process, by eluding the vigilance of his keepers before he is put in hold, is also an offence against public justice, and the party himself is punishable by fine or imprisonment [d]. But the officer permitting such escape, either by negligence or connivance, is [130] much more culpable than the prisoner: the natural desire of liberty pleading strongly in his behalf, though he ought in strictness of law to submit himself quietly to custody, till cleared by the due course of justice. Officers therefore who, after arrest, *negligently* permit a felon to escape, are also punishable by fine [e]: but *voluntary* escapes, by consent and connivance of the officer, are a much more serious offence: for it is generally agreed that such escapes amount to the same kind of offence, and are punishable in the same degree, as the offence of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or trespass. And this whether he were actually committed to gaol, or only under a bare arrest [f]. But the officer cannot be thus punished, till the original delinquent hath actually received judgment or been attainted upon verdict, confession, or outlawry, of the crime for which he was so committed or arrested: otherwise it might happen, that the officer might be punished for treason or felony, and the person arrested and escaping might turn out to be an innocent man. But, before the conviction of the principal party, the officer thus neglecting his duty may be fined and imprisoned for a misdemesnor [g].

5. BREACH of prison by the offender himself, when committed for any cause, was felony at the common law [h]; or even conspiring to break it [i]. But this severity is mitigated by the statute *de frangentibus prisonam*, 1 Edw. II. which

[d] 2 Hawk. P. C. 122.
[e] 1 Hal. P. C. 600.
[f] 2 Hal. P. C. 590. 2 Hawk. P. C. 134.
[g] 1 Hal. P. C. 588, 9. 2 Hawk. P. C. 134, 5.
[h] 1 Hal. P. C. 607.
[i] Bract. l. 3. c. 9.

enacts, that no perſon ſhall have judgment of life or member for breaking priſon, unleſs committed for ſome capital offence. So that to break priſon and eſcape, when lawfully committed for any treaſon or felony, remains ſtill felony as at the common law; and to break priſon, (whether it be the county gaol, the ſtocks, or other uſual place of ſecurity,) when lawfully confined upon any other inferior charge, is ſtill puniſhable as a high miſdemeſnor by fine and impriſonment. For the ſtatute, which ordains that ſuch offence ſhall be no [131] longer capital, never meant to exempt it entirely from every degree of puniſhment [j].

6. RESCUE is the forcibly and knowingly freeing another from an arreſt or impriſonment; and it is generally the ſame offence in the ſtranger ſo reſcuing, as it would have been in a gaoler to have *voluntarily* permitted an eſcape. A reſcue therefore of one apprehended for felony, is felony; for treaſon, treaſon; and for a miſdemeſnor, a miſdemeſnor alſo. But here likewiſe, as upon voluntary eſcapes, the principal muſt firſt be attainted or receive judgment before the reſcuer can be puniſhed: and for the ſame reaſon; becauſe perhaps in fact it may turn out that there has been no offence committed [k]. By ſtatute 11 Geo. II. c. 26. and 24 Geo. II. c. 40. if five or more perſons aſſemble to reſcue any retailers of ſpirituous liquors, or to aſſault the informers againſt them, it is felony, and ſubject to tranſportation for ſeven years. By the ſtatute 16 Geo. II. c. 31. to convey to any priſoner in cuſtody for treaſon or felony any arms, inſtruments of eſcape, or diſguiſe, without the knowlege of the gaoler, though no eſcape be attempted, or any way to aſſiſt ſuch priſoner to attempt an eſcape, though no eſcape be actually made, is felony, and ſubjects the offender to tranſportation for ſeven years: or if the priſoner be in cuſtody for petit larceny or other inferior offence, or charged with a debt of 100*l.* it is then a miſdemeſnor, puniſhable with fine and impriſonment. And by ſeveral ſpecial ſtatutes [l], to reſcue or attempt to reſcue, any

[j] 2 Hawk. P. C. 128.

[k] 1 Hal. P. C. 607. Foſt. 344.

[l] 6 Geo. I. c. 23. (Tranſportation.) 9 Geo. I. c. 22. (Black-act.) 8 Geo. II. c. 20. (Deſtroying turnpikes, &c.) 19 Geo. II. c. 34. (Smuggling.) 25 Geo. II. c. 37. (Murder.) 27 Geo. II. c. 15. (Black-act.)

perſon

perſon committed for the offences enumerated in thoſe acts, is felony without benefit of clergy; and to reſcue, or attempt to reſcue, the body of a felon executed for murder, is ſingle felony, and ſubject to tranſportation for ſeven years. Nay, even if any perſon be charged with any of the offences againſt the black-act, 9 Geo. I. c. 22. and, being required by order of the privy council to ſurrender himſelf, neglects ſo to do for forty days, both he and all that knowingly conceal, aid, abet, or ſuccour him, are felons without benefit of clergy.

7. ANOTHER capital offence againſt public juſtice is the [132] *returning from tranſportation*, or being ſeen at large in Great Britain, before the expiration of the term for which the offender was ordered to be tranſported, or had agreed to tranſport himſelf. This is made felony without benefit of clergy in all caſes, by ſtatutes 4 Geo. I. c. 11. 6 Geo. I. c. 23. 16 Geo. II. c. 15. and 8 Geo. III. c. 15. as is alſo the aſſiſting them to eſcape from ſuch as are conveying them to the port of tranſportation (1).

8. AN eighth is that of *taking a reward*, under pretence of *helping* the owner to his *ſtolen goods*. This was a contrivance carried to a great length of villany in the beginning of the reign of George the firſt: the confederates of the felons thus diſpoſing of ſtolen goods, at a cheap rate, to the owners

(1) It has been thought that, where a convict has been pardoned upon condition of tranſporting himſelf for life or a certain number of years, if he did not comply with that condition, he might be remitted to his original ſentence, and in ſome caſes that he was ſubject to no other puniſhment. See *Leach's Crown Caſes*, 197. 303. But the 24 Geo. III. c. 56. ſeems to include every poſſible caſe, by enacting, that if any offender ſhall be ordered by the court to be tranſported, or ſhall agree to tranſport himſelf on certain conditions, either for life or any number of years, and ſhall be afterwards at large before the expiration of the term, without lawful cauſe, in any part of Great Britain or Ireland, he ſhall, being lawfully convicted thereof, ſuffer death without benefit of clergy.

themſelves, and thereby ſtifling all farther inquiry. The famous Jonathan Wild had under him a well-diſciplined corps of thieves, who brought in all their ſpoils to him; and he kept a ſort of public office for reſtoring them to the owners at half price. To prevent which audacious practice, to the ruin and in defiance of public juſtice, it was enacted by ſtatute 4 Geo. I. c. 11. that whoever ſhall take a reward under the pretence of helping any one to ſtolen goods, ſhall ſuffer as the felon who ſtole them; unleſs he cauſes ſuch principal felon to be apprehended and brought to trial, and alſo gives evidence againſt them. Wild, ſtill continuing in his old practice, was upon this ſtatute at laſt convicted and executed[m].

9. RECEIVING of ſtolen goods, *knowing them to be ſtolen*, is alſo a high miſdemeſnor and affront to public juſtice. We have ſeen in a former chapter[n], that this offence, which is only a miſdemeſnor at common law, by the ſtatute 3 & 4 W. & M. c. 9. and 5 Ann. c. 31. makes the offender acceſſory to the theft and felony. But becauſe the acceſſory cannot in general be tried, unleſs with the principal or after the principal is convicted, the receivers by that means frequently eluded juſtice. To remedy which, it is enacted by ſtatute 1 Ann. c. 9. and 5 Ann. c. 31. that ſuch receivers may ſtill be proſecuted for a miſdemeſnor, and puniſhed by fine and impriſonment, though the principal felon be not before taken
[133] ſo as to be proſecuted and convicted. And, in caſe of receiving ſtolen lead, iron, and certain other metals, ſuch offence is by ſtatute 29 Geo. II. c. 30. puniſhable by tranſportation for fourteen years[o]. So that now the proſecutor has two methods in his choice; either to puniſh the receivers for the miſdemeſnor immediately, before the thief is taken[p]; or to wait till the felon is convicted, and then puniſh them as acceſſories to the felony. But it is provided by the ſame ſtatutes, that he ſhall only make uſe of one, and not both of

[m] See ſtat. 6 Geo. I. c. 23. § 9.
[n] See pag. 38.
[o] See alſo ſtatute 2 Geo. III. c. 28. § 22. for the puniſhment of receivers of goods ſtolen by bum-boats, &c. in the Thames.
[p] Foſter, 373.

theſe methods of puniſhment. By the ſame ſtatute alſo 29 Geo. II. c. 30. perſons having lead, iron, and other metals in their cuſtody, and not giving a ſatisfactory account how they came by the ſame, are guilty of a miſdemeſnor and puniſhable by fine or imprisonment. And by ſtatute 10 Geo. III. c. 48. all knowing receivers of ſtolen plate or jewels, taken by robbery on the highway, or when a burglary accompanies the ſtealing, may be tried as well before as after the conviction of the principal, and whether he be in or out of cuſtody; and, if convicted, ſhall be adjudged guilty of felony, and tranſported for fourteen years (2).

(2) By the common law, the receiving of ſtolen goods was a miſdemeſnor; but by the 3 W. & M. c. 9. the buyer or receiver of ſtolen goods was made an acceſſory after the fact, and from that time the common law miſdemeſnor became merged in the felony. By the 4 Geo. I. c. 11. perſons convicted of buying or receiving ſtolen goods, knowing them to be ſtolen, may be tranſported for fourteen years. But this ſtatute has a reference to the former ſtatutes, by which receivers are made acceſſaries, and as there can be no acceſſaries to petty larceny, this ſtatute has operation only in cases where the principal is previouſly convicted of grand larceny. *Fost.* 78. 378. And as theſe ſtatutes did not extend to the receivers of ſtolen goods, where the principal was guilty only of petty larceny, the 22 Geo. III. c. 5. was paſſed, which comprehends all deſcriptions of receivers whatever, it expreſsly excepts the receivers of lead, iron, copper, braſs, bell-metal, and ſolder, who are puniſhable by 29 Geo. II. c. 30. by tranſportation for fourteen years, and alſo the caſe where the principal has been convicted of grand larceny, or ſome greater offence, in that inſtance the receiver muſt ſtill be proſecuted as an acceſſary to the felony; and by the 4 Geo. I. c. 11. muſt be tranſported for fourteen years. But in every other inſtance, whether the principal has committed petty larceny, grand larceny, or ſome greater offence, the receiver may be proſecuted for a miſdemeſnor, and be puniſhed by fine, imprisonment, or whipping, whether the principal felon be, or be not, convicted, or be, or be not, amenable to juſtice. And every perſon, under fifteen years of age, guilty of any felony within benefit of clergy, ſhall be entitled to a pardon, if he makes ſuch a diſcovery as produces

10. OF a nature ſomewhat ſimilar to the two laſt is the offence of *theft bote*, which is where the party robbed not only knows the felon, but alſo takes his goods again, or other
[134] amends, upon agreement not to proſecute. This is frequently called compounding of felony, and formerly was held to make a man an acceſſary; but is now puniſhed only with fine and impriſonment [q]. This perverſion of juſtice, in the old Gothic conſtitutions, was liable to the moſt ſevere and infamous puniſhment. And the Salic law, "*latroni eum ſimilem habuit, qui furtum celare vellet, et occulte ſine judice compoſitionem ejus admittere* [r]." By ſtatute 25 Geo. II. c. 36. even to adverti ſe a reward for the return of things ſtolen, with no queſtions aſked, or words to the ſame purport, ſubjects the adverti ſer and the printer to a forfeiture of 50*l.* each.

11. COMMON *barretry* is the offence of frequently exciting and ſtirring up ſuits and quarrels between his ma-

[q] 1 Hawk. P. C. 125. [r] Stiernh. *de jure Goth. l.* 3. *c.* 5.

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duces the conviction of two perſons guilty of buying or receiving ſtolen goods. It has been determined that money and bank notes are not goods within the meaning of theſe ſtatutes. *Leach.* 208. 368. Upon the trial of the receiver, the principal felon may be admitted a witneſs. *Leach.* 325. When the 3 & 4 W. & M. c. 9. had made the receiver of ſtolen goods an acceſſary after the fact, his puniſhment in the caſe of grand larceny, was the ſame at that time as that of the principal, *viz.* burning in the hand, and impriſonment not exceeding a year: but the puniſhment of the principal by the 4 Geo. I. c. 11. might be changed at the diſcretion of the court into tranſportation for ſeven years; but it ſeems to be underſtood that the clauſe in that ſtatute reſpecting the receiver is imperative, and that the court is obliged to ſentence him to tranſportation for fourteen years. *Foſt.* 73.

In an indictment for a miſdemeſnor containing a count, which ſtates the things ſtolen of ſuch a value as makes the offence grand larceny in the principal, it is not neceſſary to aver that the principal has not been before convicted; but if the defendant can ſhew that he has been before convicted, the receiver muſt be acquitted upon that indictment, though he would ſubject himſelf to be tried upon another indictment, and upon conviction would be liable to tranſportation for fourteen years. 5 *T. R.* 83.

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jesty's subjects, either at law or otherwise[s]. The punishment for this offence, in a common person, is by fine and imprisonment: but if the offender (as is too frequently the case) belongs to the profession of the law, a barretor, who is thus able as well as willing to do mischief, ought also to be disabled from practising for the future[t]. And indeed it is enacted by statute 12 Geo. I. c. 29. that if any one, who hath been convicted of forgery, perjury, subornation of perjury, or common barretry, shall practise as an attorney, solicitor, or agent, in any suit; the court, upon complaint, shall examine it in a summary way; and, if proved, shall direct the offender to be transported for seven years. Hereunto may also be referred another offence, of equal malignity and audaciousness; that of suing another in the name of a fictitious plaintiff; either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the king's superior courts, is left, as a high contempt, to be punished at their discretion. But in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it is directed by statute 8 Eliz. c. 2. to be punished by six months imprisonment, and treble damages to the party injured.

12. MAINTENANCE is an offence that bears a near relation to the former; being an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either [135] party with money or otherwise, to prosecute or defend it[u]: a practice that was greatly encouraged by the first introduction of uses[w]. This is an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression. And therefore, by the Roman law, it was a species of the *crimen falsi* to enter into any confederacy, or do any act to support another's lawsuit, by money, witnesses, or patronage[x]. A man may however maintain the suit of his near kinsman, servant, or poor neighbour, out of charity and compassion, with

[s] 1 Hawk. P. C. 243.
[t] 1 Hawk. P. C. 244.
[u] Hawk. P. C. 249.
[w] Dr. & St. 203.
[x] *Ff.* 47. 10. 20.

impunity.

impunity. Otherwiſe the puniſhment by common law is fine and impriſonment[y]; and by the ſtatute 32 Hen. VIII. c. 9. a forfeiture of ten pounds.

13. CHAMPERTY, *campi-partitio*, is a ſpecies of maintenance, and puniſhed in the ſame manner[z]: being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter ſued for between them, if they prevail at law; whereupon the champertor is to carry on the party's ſuit at his own expence[a]. Thus *champart*, in the French law, ſignifies a ſimilar diviſion of profits, being a part of the crop annually due to the landlord by bargain or cuſtom. In our ſenſe of the word, it ſignifies the purchaſing of a ſuit, or right of ſuing: a practice ſo much abhorred by our law, that it is one main reaſon why a *choſe* in action, or thing of which one hath the right but not the poſſeſſion, is not aſſignable at common law; becauſe no man ſhould purchaſe any pretence to ſue in another's right. Theſe peſts of civil ſociety, that are perpetually endeavouring to diſturb the repoſe of their neighbours, and officiouſly interfering in other men's quarrels, even at the hazard of their own fortunes, were ſeverely animadverted on by the Roman law: "*qui improbe coeunt in alienam litem, ut quicquid ex condemnatione in rem ipſius redactum fuerit inter eos communicaretur, lege Julia de vi privata tenentur*[b];" and they were puniſhed by the forfeiture of a third part of their goods, and perpetual infamy. Hitherto alſo muſt be referred the proviſion of [136] the ſtatute 32 Hen. VIII. c. 9. that no one ſhall ſell or purchaſe any pretended right or title to land, unleſs the vender hath received the profits thereof for one whole year before ſuch grant, or hath been in actual poſſeſſion of the land, or of the reverſion or remainder; on pain that both purchaſor and vender ſhall each forfeit the value of ſuch land to the king and the proſecutor. Theſe offences relate chiefly to the commencement of *civil* ſuits: but

14. THE *compounding of informations* upon penal ſtatutes are an offence of an equivalent nature in *criminal* cauſes;

[y] 1 Hawk. P. C. 255.
[z] *Ibid.* 257.
[a] Stat. of conſpirat. 33 Edw. I.
[b] *Ff.* 48. 7. 6.

and

and are, beſides, an additional miſdemeſnor againſt public juſtice, by contributing to make the laws odious to the people. At once therefore to diſcourage malicious informers, and to provide that offences, when once diſcovered, ſhall be duly proſecuted, it is enacted by ſtatute 18 Eliz. c. 5. that if any perſon, informing under pretence of any penal law, makes any compoſition without leave of the court, or takes any money or promiſe from the defendant to excuſe him, (which demonſtrates his intent in commencing the proſecution to be merely to ſerve his own ends, and not for the public good (3),) he ſhall forfeit 10*l.* ſhall ſtand two hours on the pillory, and ſhall be for ever diſabled to ſue on any popular or penal ſtatute.

15. A CONSPIRACY alſo to indict an innocent man of felony falſely and maliciouſly, who is accordingly indicted and acquitted, is a farther abuſe and perverſion of public juſtice; for which the party injured may either have a civil action by writ of conſpiracy, (of which we ſpoke in the preceding book[b],) or the conſpirators, for there muſt be at leaſt two to form a conſpiracy, may be indicted at the ſuit of the king, and were by the antient common law[d] to receive what is called the *villenous* judgment; *viz.* to loſe their *liberam legem*, whereby they are diſcredited and diſabled as jurors or witneſſes; to forfeit their goods and chattels, and lands for life; to have thoſe lands waſted, their houſes razed, their trees rooted up, and their own bodies committed to priſon[e]. But it now is the better opinion, that the villenous judgment is by long diſuſe become obſolete; it not having been pronounced for [137] ſome ages: but inſtead thereof the delinquents are uſually ſentenced to impriſonment, fine, and pillory (4). To this head

[b] See Vol. III. pag. 126.
[d] Bro. *Abr. tit. conſpiracy.* 28.
[e] 1 Hawk. P. C. 193

(3) But this ſevere ſtatute extends even to penal actions, where the whole penalty is given to the proſecutor.

(4) Every confederacy to injure individuals, or to do acts which are unlawful, or prejudicial to the community, is a conſpiracy.

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may be referred the offence of ſending letters, threatening to accuſe any perſon of a crime puniſhable with death, tranſportation, pillory, or other infamous puniſhment, with a view to extort from him any money or other valuable chattels. This is puniſhable by ſtatute 30 Geo. II. c. 24. at the diſcretion of the court, with fine, impriſonment, pillory, whipping, or tranſportation for ſeven years.

16. THE next offence againſt public juſtice is when the ſuit is paſt it's commencement, and come to trial. And that

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Journeymen who refuſe to work, in conſequence of a combination, till their wages are raiſed, may be indicted for a conſpiracy. 1 *Leach. Hawk.* 348. One perſon alone cannot be guilty of a conſpiracy; but one perſon may be proſecuted for having conſpired with others, and may be tried and convicted alone. 1 *Str.* 193. In a proſecution for a conſpiracy, the actual fact of conſpiring need not be proved, but it may be inferred from circumſtances, and the concurring conduct of the defendants. 1 *Bl. Rep.* 392.—In the caſe of William Stone, who was indicted for high treaſon, viz. for compaſſing the death of the king, and for adhering to his enemies, the overt act to which the evidence chiefly applied was the conſpiring with John Stone, William Jackſon, and others unknown, to collect intelligence, and to communicate it to the enemy for their aid and inſtruction. And the Attorney-General advanced this poſition, which was admitted by the Court: "that, "as the overt act charged was a conſpiracy, of which proof was "already before the Court, the act of each conſpirator in the "proſecution of ſuch conſpiracy was evidence againſt all; that it "had been ſo determined by Mr. J. Buller in the caſe of *The King* "v. *Bowes and others*, who were convicted for a conſpiracy to "carry away Lady Strathmore; and that the ſame principle had "been alſo ſettled in *The King* v. *Hardy*, and *The King* v. *Tooke*, "at the Old Bailey in 1794."—A conſpiracy has been ſaid to be comprehended under the denomination of *crimen falſi*, and a perſon convicted of it is held to be rendered an incompetent witneſs. *Leach.* 349. But this is only true of conſpiracies, the object of which is to injure by fraud, falſehood, or perjury; for Mr. Bowes and the others convicted with him were afterwards held to be competent witneſſes by the court of delegates.

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is the crime of wilful and corrupt *perjury*; which is defined by ſir Edward Coke[f], to be a crime committed when a *lawful* oath is adminiſtered, in ſome *judicial* proceeding, to a perſon who ſwears *wilfully*, *abſolutely*, and *falſely*, in a matter *material* to the iſſue or point in queſtion. The law takes no notice of any perjury but ſuch as is committed in ſome court of juſtice, having power to adminiſter an oath; or before ſome magiſtrate or proper officer, inveſted with a ſimilar authority, in ſome proceedings relative to a civil ſuit or a criminal proſecution: for it eſteems all other oaths unneceſſary at leaſt, and therefore will not puniſh the breach of them (5). For which reaſon it is much to be queſtioned, how far any magiſtrate is juſtifiable in taking a voluntary *affidavit* in any extrajudicial matter, as is now too frequent upon every petty occaſion: ſince it is more than poſſible, that by ſuch idle oaths a man may frequently *in foro conſcientiae* incur the guilt, and at the ſame time evade the temporal penalties, of perjury. The perjury muſt alſo be corrupt, (that is, committed *malo animo*,) wilful, poſitive, and abſolute; not upon ſurprize, or the like: it alſo muſt be in ſome point material to the queſtion in diſpute; for if it only be in ſome trifling collateral circumſtance, to which no regard is paid, it is no more penal than in the voluntary extrajudicial oaths before mentioned (6). *Subornation* of perjury is the offence of procuring another to take ſuch a falſe oath, as conſtitutes perjury in the principal. [138] The puniſhment of perjury and ſubornation, at common

[f] 3 Inſt. 164.

(5) It is remarkable that the houſe of commons have no power to adminiſter an oath, except in thoſe particular inſtances in which that power is granted to them by expreſs acts of parliament. It is ſuppoſed that the reaſon they have never obtained the general authority of adminiſtering an oath, is owing to the jealouſy of the upper houſe, which, by ſecuring this privilege to itſelf, prevents the commons from participating in the judicature of parliament.

(6) A man may be indicted for perjury in ſwearing that he *believes* a fact to be true, which he muſt know to be falſe. *Leach.* 270.

law,

law, has been various. It was anciently death; afterwards baniſhment, or cutting out the tongue; then forfeiture of goods; and now it is fine and impriſonment, and never more to be capable of bearing teſtimony[g]. But the ſtatute 5 Eliz. c. 9. (if the offender be proſecutor thereon) inflicts the penalty of perpetual infamy, and a fine of 40*l.* on the ſuborner: and in default of payment, impriſonment for ſix months, and to ſtand with both ears nailed to the pillory. Perjury itſelf is thereby puniſhed with ſix months impriſonment, perpetual infamy, and a fine of 20*l.* or to have both ears nailed to the pillory. But the proſecution is uſually carried on for the offence at common law; eſpecially as, to the penalties before inflicted, the ſtatute 2 Geo. II. c. 25. ſuperadds a power, for the court to order the offender to be ſent to the houſe of correction for a term not exceeding ſeven years, or to be tranſported for the ſame period; and makes it felony without benefit of clergy to return or eſcape within the time. It has ſometimes been wiſhed, that perjury, at leaſt upon capital accuſations, whereby another's life has been or might have been deſtroyed, was alſo rendered capital, upon a principle of retaliation; as it is in all caſes by the laws of France[h]. And certainly the odiouſneſs of the crime pleads ſtrongly in behalf of the French law. But it is to be conſidered, that there they admit witneſſes to be heard only on the ſide of the proſecution, and uſe the rack to extort a confeſſion from the accuſed. In ſuch a conſtitution therefore it is neceſſary to throw the dread of capital puniſhment into the other ſcale, in order to keep in awe the witneſſes for the crown; on whom alone the priſoner's fate depends; ſo naturally does one cruel law beget another. But corporal and pecuniary puniſhments, exile, and perpetual infamy, are more ſuited to the genius of the Engliſh law: where the fact is openly diſcuſſed between witneſſes on *both* ſides, and the evidence for the crown may be contradicted and diſproved by thoſe of the priſoner. Where indeed the death of an innocent perſon has actually been the conſequence of ſuch wilful perjury, it falls within the guilt

[139]

[g] 3 Inſt. 163. [h] Monteſ. Sp. L. b. 29. c. 11.

of

of deliberate murder, and deſerves an equal puniſhment: which our antient law in fact inflicted [l]. But the mere attempt to deſtroy life by other means not being capital, there is no reaſon that an attempt by perjury ſhould; much leſs that this crime ſhould in *all* judicial caſes be puniſhed with death. For to multiply capital puniſhments leſſens their effect, when applied to crimes of the deepeſt dye; and, deteſtable as perjury is, it is not by any means to be compared with ſome other offences, for which only death can be inflicted; and therefore it ſeems already (except perhaps in the inſtance of deliberate murder by perjury) very properly puniſhed by our preſent law, which has adopted the opinion of Cicero [m], derived from the law of the twelve tables, "*perjurii poena* ac *divina, exitium; humana, dedecus* (7)."

17. BRIBERY is the next ſpecies of offence againſt public juſtice; which is when a judge, or other perſon concerned in the adminiſtration of juſtice, takes any undue reward to influence his behaviour in his office [n]. In the eaſt it is the cuſtom never to petition any ſuperior for juſtice, not excepting their kings, without a preſent. This is calculated for the genius of deſpotic countries; where the true principles of government are never underſtood, and it is imagined that there is no obligation from the ſuperior to the inferior, no relative duty owing from the governor to the governed. The Roman law, though it contained many ſevere injunctions againſt bribery, as well for ſelling a man's vote in the ſenate or other public aſſembly, as for the bartering of common juſtice, yet, by a ſtrange indulgence in one inſtance, it tacitly encouraged this practice; allowing the magiſtrate to receive ſmall preſents, provided they did not in the whole exceed a hundred crowns in the year [o]: not conſidering the inſinuating nature and gigantic progreſs of this vice, when once admitted. Plato therefore more wiſely, in his ideal republic [p],

[l] Britton. c. 5.
[m] *Leg.* 2. 9.
[n] 1 Hawk. P. C. 168.
[o] *Ff.* 48. 11. 6.
[p] *de Leg. l.* 12.

(7) See this ſubject further diſcuſſed in p. 196. *poſt.*

orders those who take presents for doing their duty to be punished in the severest manner: And by the laws of Athens he that offered was also prosecuted, as well as he that received a bribe [o]. In England this offence of taking bribes is punished, in inferior officers, with fine and imprisonment; and in those who offer a bribe, though not taken, the same [p]. But in judges, especially the superior ones, it hath been always looked upon as so heinous an offence, that the chief justice Thorpe was hanged for it in the reign of Edward III. By a statute [q] 11 Hen. IV. all judges and officers of the king, convicted of bribery, shall forfeit treble the bribe, be punished at the king's will, and be discharged from the king's service for ever. And some notable examples have been made in parliament, of persons in the highest stations, and otherwise very eminent and able, but contaminated with this sordid vice (8).

18. EMBRACERY is an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like [r]. The punishment for the person embracing is by fine and imprisonment; and for the juror so embraced, if it be by taking money, the punishment is (by divers statutes of the reign of Edward III.) perpetual infamy, imprisonment for a year, and forfeiture of the tenfold value.

19. THE *false verdict* of jurors, whether occasioned by embracery or not, was antiently considered as criminal, and therefore exemplarily punished by attaint in the manner formerly mentioned [s].

20. ANOTHER offence of the same species is the *negligence of public officers*, entrusted with the administration of justice,

[o] Pott. Antiq. b. 1. c. 25.
[p] 3 Inst. 147.
[q] *Ibid.* 146.
[r] 1 Hawk. P. C. 259.
[s] See Vol. III. pag. 402, 403.

(8) It was held to be a misdemesnor to offer a sum of money to the first lord of the treasury, for the purpose of obtaining an office or appointment under government, by his interest and recommendation. 4 *Burr.* 2498. For bribery at elections, see 1 vol. p. 179.

as ſheriffs, coroners, conſtables, and the like, which makes the offender liable to be fined; and in very notorious caſes will amount to a forfeiture of his office, if it be a beneficial one [r]. Alſo the omitting to apprehend perſons, offering ſtolen [141] iron, lead, and other metals to ſale, is a miſdemeſnor, and puniſhable by a ſtated fine, or impriſonment, in purſuance of the ſtatute 29 Geo. II. c. 30.

21. THERE is yet another offence againſt public juſtice, which is a crime of deep malignity; and ſo much the deeper, as there are many opportunities of putting it in practice, and the power and wealth of the offenders may often deter the injured from a legal proſecution. This is the *oppreſſion* and tyrannical partiality of judges, juſtices, and other *magiſtrates*, in the adminiſtration and under the colour of their office. However, when proſecuted, either by impeachment in parliament, or by information in the court of king's bench, (according to the rank of the offenders,) it is ſure to be ſeverely puniſhed with forfeiture of their offices, (either conſequential or immediate,) fines, impriſonment, or other diſcretionary cenſure, regulated by the nature and aggravations of the offence committed (9).

22. LASTLY, *extortion* is an abuſe of public juſtice, which conſiſts in any officer's unlawfully taking, by colour of his office, from any man, any money or thing of value, that is not due to him, or more than is due, or before is is due [s]. The puniſhment is fine and impriſonment, and ſometimes a forfeiture of the office.

[r] 1 Hawk. P. C. 168. [s] 1 Hawk. P. C. 170.

(9) For actions and proſecutions againſt juſtices of the peace, ſee 1 vol. p. 354. n. 17.

CHAPTER THE ELEVENTH.

OF OFFENCES AGAINST THE PUBLIC PEACE.

WE are next to conſider offences againſt the public *peace*; the conſervation of which is intruſted to the king and his officers, in the manner and for the reaſons which were formerly mentioned at large [a]. Theſe offences are either ſuch as are an actual breach of the peace; or conſtructively ſo, by tending to make others break it. Both of theſe ſpecies are alſo either felonious, or not felonious. The felonious breaches of the peace are ſtrained up to that degree of malignity by virtue of ſeveral modern ſtatutes: and, particularly,

1. THE *riotous aſſembling* of *twelve* perſons, or more, and not diſperſing upon proclamation. This was firſt made high treaſon by ſtatute 3 & 4 Edw. VI. c. 5. when the king was a minor, and a change in religion to be effected: but that ſtatute was repealed by ſtatute 1 Mar. c. 1. among the other treaſons created ſince the 25 Edw. III.; though the prohibition was in ſubſtance re-enacted, with an inferior degree of puniſhment, by ſtatute 1 Mar. ſt. 2. c. 12. which made the ſame offence a ſingle felony. Theſe ſtatutes ſpecified and particularized the nature of the riots they were meant to ſuppreſs; as, for example, ſuch as were ſet on foot with intention to offer violence to the privy council, or to change the laws of the kingdom, or for certain other ſpecific purpoſes:

[a] Vol. I. pag. 118. 268. 350.

in

in which caſes, if the perſons were commanded by proclamation to diſperſe; and they did not, it was by the ſtatute of Mary made felony, but within the benefit of clergy; and alſo the act indemnified the peace officers and their aſſiſtants, if they killed any of the mob in endeavouring to ſuppreſs ſuch riot. This was thought a neceſſary ſecurity in that ſanguinary reign, when popery was intended to be re-eſtabliſhed, which was like to produce great diſcontents: but at firſt it [143] was made only for a year, and was afterwards continued for that queen's life. And, by ſtatute 1 Eliz. c. 16. when a reformation in religion was to be once more attempted, it was revived and continued during her life alſo; and then expired. From the acceſſion of James the firſt to the death of queen Anne, it was never once thought expedient to revive it: but, in the firſt year of George the firſt, it was judged neceſſary, in order to ſupport the execution of the act of ſettlement, to renew it, and at one ſtroke to make it perpetual, with large additions. For, whereas the former acts expreſsly defined and ſpecified what ſhould be accounted a riot, the ſtatute 1 Geo. I. c. 5. enacts, generally, that if any twelve perſons are unlawfully aſſembled to the diſturbance of the peace, and any one juſtice of the peace, ſheriff, under-ſheriff, or mayor of a town, ſhall think proper to command them by proclamation to diſperſe, if they contemn his orders and continue together for one hour afterwards, ſuch contempt ſhall be felony without benefit of clergy. And farther, if the reading of the proclamation be by force oppoſed, or the reader be in any manner wilfully hindered from the reading of it, ſuch oppoſers and hinderers are felons without benefit of clergy: and all perſons to whom ſuch proclamation *ought to have been made*, and knowing of ſuch hinderance, and not diſperſing, are felons without benefit of clergy. There is the like indemnifying clauſe, in caſe any of the mob be unfortunately killed in the endeavour to diſperſe them; being copied from the act of queen Mary. And, by a ſubſequent clauſe of the new act, if any perſon, ſo riotouſly aſſembled, begin even before proclamation to pull down any church, chapel, meet-

ing-houſe, dwelling-houſe, or out-houſes, they ſhall be felons without benefit of clergy (1).

2. By ſtatute 1 Hen. VII. c. 7. *unlawful hunting* in any legal foreſt, park, or warren, not being the king's property, *by night*, or with *painted faces*, was declared to be ſingle felony. But now by the ſtatute 9 Geo. I. c. 22. to appear armed in any incloſed foreſt or place where deer are uſually kept, or in any warren for hares or conies, or in any high
[144] road, open heath, common, or down, by day or night, with faces blacked or otherwiſe *diſguiſed*, or (being ſo diſguiſed) to hunt, wound, kill, or ſteal any deer, to rob a warren, or to ſteal fiſh, or to procure by gift or promiſe of reward any perſon to join them in ſuch unlawful act, is felony without benefit of clergy. I mention theſe offences in this place, not on account of the damage thereby done to private property, but of the manner in which that damage is committed: namely, with the face blacked or with other diſguiſe, and, being armed with offenſive weapons, to the breach of the public peace and the terror of his majeſty's ſubjects.

3. Also by the ſame ſtatute 9 Geo. I. c. 22. amended by ſtatute 27 Geo. II. c. 15. knowingly to ſend any *letter* without a name, or with a fictitious name, *demanding* money, veniſon, or any other valuable thing, or *threatening* (without any demand) to kill any of the king's ſubjects, or to fire their houſes, out-houſes, barns, or ricks, is made felony without benefit of clergy (2). This offence was formerly high treaſon by the ſtatute 8 Hen. V. c. 6.

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(1) And in another clauſe of the ſame act, perſons injured by any buildings being demoliſhed by a riotous aſſembly, may recover damages in an action againſt the hundred. And it was determined after the riots in 1780, that the owners of houſes might recover damages alſo for the deſtruction of furniture, or for any injury to their property done at the ſame time that the buildings were demoliſhed, or were in part pulled down. *Doug.* 673.

(2) The words of theſe ſtatutes are, *ſhall knowingly ſend*, and therefore it has been determined if the writer of a threatening letter delivers it himſelf, he is not guilty of felony. *Leach.* 351.

4. To

4. To pull down or deſtroy any *lock*, *ſluice*, or *floodgate*, erected by authority of parliament on a navigable river, is by ſtatute 1 Geo. II. ſt. 2. c. 19. made felony, puniſhable with tranſportation for ſeven years (3). By the ſtatute 8 Geo. II. c. 20. the offence of deſtroying ſuch works, or reſcuing any perſon in cuſtody for the ſame, is made felony without benefit of clergy; and it may be inquired of and tried in any adjacent county, as if the fact had been therein committed. By the ſtatute 4 Geo. III. c. 12. maliciouſly to damage or deſtroy any banks, ſluices, or other works on ſuch navigable river, to open the floodgates, or otherwiſe obſtruct the navigation, is again made felony, puniſhable with tranſportation for ſeven years. And by the ſtatute 7 Geo. III. c. 40. (which repeals all former acts relating to turnpikes) maliciouſly to pull down or otherwiſe deſtroy any *turnpike-gate*, or fence, toll-houſe, or weighing-engine thereunto belonging, erected by authority of parliament, or to reſcue any perſon [145] in cuſtody for the ſame, is made felony without benefit of clergy; and the indictment may be inquired of and tried in any adjacent county (4). The remaining offences againſt the public peace are merely miſdemeſnors, and no felonies; as,

5. AFFRAYS (from *affraier*, to terrify) are the fighting of two or more perſons in ſome public place, to the terror of his majeſty's ſubjects: for, if the fighting be in private, it is

(3) This ſtatute of 1 Geo. II. ſt. 2. c. 19. after ſeveral continuances, was ſuffered to expire in 1748.

(4) The ſtatute of 7 Geo. III. c. 40. is repealed by the 13 Geo. III. c. 84. by which the offence deſcribed in the former ſtatute is made felony, puniſhable at the diſcretion of the court by tranſportation for ſeven years, or impriſonment for any time not exceeding three years.

And this is extended by the 21 Geo. III. c. 20. to all acts ſubſequent to the 13 Geo. III. which had been, or ſhould in future be, paſſed for amending and repairing any particular turnpike road in England.

no *affray* but an *assault* [b]. Affrays may be suppressed by any private person present, who is justifiable in endeavouring to part the combatants, whatever consequence may ensue [c]. But more especially the constable, or other similar officer, however denominated, is bound to keep the peace; and to that purpose may break open doors to suppress an affray, or apprehend the affrayers; and may either carry them before a justice, or imprison them by his own authority for a convenient space till the heat is over; and may then perhaps also make them find sureties for the peace [d]. The punishment of common affrays is by fine and imprisonment; the measure of which must be regulated by the circumstances of the case: for, where there is any material aggravation, the punishment proportionably increases. As where two persons coolly and deliberately engage in a duel; this being attended with an apparent intention and danger of murder, and being a high contempt of the justice of the nation, is a strong aggravation of the affray, though no mischief has actually ensued [e]. Another aggravation is, when thereby the officers of justice are disturbed in the due execution of their office: or where a respect to the particular place ought to restrain and regulate men's behaviour, more than in common ones; as in the
[146] king's court, and the like. And upon the same account also all affrays in a church or church-yard are esteemed very heinous offences, as being indignities to him to whose service those places are consecrated. Therefore mere quarrelsome words, which are neither an affray nor an offence in any other place, are penal here. For it is enacted by statute 5 & 6 Edw. VI. c. 4. that if any person shall, by words only, quarrel, chide, or brawl, in a church or church-yard, the ordinary shall suspend him, if a layman, *ab ingressu ecclesiae*; and, if a clerk in orders, from the ministration of his office during pleasure. And, if any person in such church or church-yard proceeds to smite or lay violent hands upon another, he shall be excommunicated *ipso facto*; or if he strikes him with a weapon, or draws any weapon with intent to

[b] 1 Hawk. P. C. 134.
[c] *Ibid.* 136.
[d] *Ibid.* 137.
[e] *Ibid.* 138.

strike,

ſtrike, he ſhall beſides excommunication (being convicted by a jury) have one of his ears cut off; or, having no ears, be branded with the letter F in his cheek. *Two* perſons may be guilty of an affray: but,

6. RIOTS, *routs*, and *unlawful aſſemblies*, muſt have *three* perſons at leaſt to conſtitute them. An *unlawful aſſembly* is when three, or more, do aſſemble themſelves together to do an unlawful act, as to pull down incloſures, to deſtroy a warren or the game therein; and part without doing it, or making any motion towards it[f]. A *rout* is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common, or of way: and make ſome advances towards it[g]. A *riot* is where three or more actually do an unlawful act of violence, either with or without a common cauſe or quarrel[h]: as if they beat a man; or hunt and kill game in another's park, chaſe, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuſance, in a violent and tumultuous manner. The puniſhment of unlawful aſſemblies, if to the number of twelve, we have juſt now ſeen, may be capital, according [147] to the circumſtances that attend it; but, from the number of three to eleven, is by fine and impriſonment only. The ſame is the caſe in riots and routs by the common law; to which the pillory in very enormous caſes has been ſometimes ſuperadded[i]. And by the ſtatute 13 Hen. IV. c. 7. any two juſtices, together with the ſheriff or under-ſheriff of the county, may come with the *poſſe comitatus*, if need be, and ſuppreſs any ſuch riot, aſſembly, or rout, arreſt the rioters, and record upon the ſpot the nature and circumſtances of the whole tranſaction; which record alone ſhall be a ſufficient conviction of the offenders. In the interpretation of which ſtatute it hath been holden, that all perſons, noblemen and others, except women, clergymen, perſons decrepit, and in-

[f] 3 Inſt. 176.
[g] Bro. *Abr. t. Riot.* 4. 5.
[h] 3 Inſt. 176.
[i] 1 Hawk. P. C. 159.

ſants

ſants under fifteen, are bound to attend the juſtices in ſuppreſſing a riot, upon pain of fine and impriſonment; and that any battery, wounding, or killing the rioters, that may happen in ſuppreſſing the riot, is juſtifiable[j]. So that our antient law, previous to the modern riot act, ſeems pretty well to have guarded againſt any violent breach of the public peace; eſpecially as any riotous aſſembly on a public or general account, as to redreſs grievances or pull down all incloſures, and alſo reſiſting the king's forces if ſent to keep the peace, may amount to overt acts of high treaſon, by levying war againſt the king.

7. NEARLY related to this head of riots is the offence of *tumultuous petitioning*; which was carried to an enormous height in the times preceding the grand rebellion. Wherefore by ſtatute 13 Car. II. ſt. 1. c. 5. it is enacted, that not more than twenty names ſhall be ſigned to any petition to the king or either houſe of parliament, for any alteration of matters eſtabliſhed by law in church or ſtate; unleſs the contents thereof be previouſly approved, in the country, by three juſtices, or the majority of the grand jury at the aſſiſes or quarter-ſeſſions; and, in London, by the lord mayor, aldermen, and common council[k]: and that no petition ſhall
[148] be delivered by a company of more than ten perſons: on pain in either caſe of incurring a penalty not exceeding 100*l.* and three months impriſonment.

8. AN eighth offence againſt the public peace is that of a *forcible entry* or *detainer*; which is committed by violently taking or keeping poſſeſſion of lands and tenements, with menaces, force, and arms, and without the authority of law. This was formerly allowable to every perſon diſſeiſed, or turned out of poſſeſſion, unleſs his entry was taken away or barred by his own neglect, or other circumſtances; which were explained more at large in a former volume[l]. But this

[j] 1 Hal. P. C. 495. 1 Hal. P. C. 161.

[k] This may be one reaſon (among others) why the corporation of London has, ſince the reſtoration, uſually taken the lead in petitions to parliament for the alteration of any eſtabliſhed law.

[l] See Vol. III. pag. 174, &c.

being

being found very prejudicial to the public peace, it was thought neceſſary by ſeveral ſtatutes to reſtrain all perſons from the uſe of ſuch violent methods, even of doing themſelves juſtice; and much more if they have no juſtice in their claim [m]. So that the entry now allowed by law is a peaceable one; that forbidden is ſuch as is carried on and maintained with force, with violence, and unuſual weapons. By the ſtatute 5 Ric. II. ſt. 1. c. 8. all forcible entries are puniſhed with impriſonment and ranſom at the king's will. And by the ſeveral ſtatutes of 15 Ric. II. c. 2. 8 Hen. VI. c. 9. 31 Eliz. c. 11. and 21 Jac. I. c. 15. upon any forcible entry, or forcible detainer after peaceable entry, into any lands, or benefices of the church, one or more juſtices of the peace, taking ſufficient power of the county, may go to the place, and there record the force upon his own view, as in caſe of riots; and upon ſuch conviction may commit the offender to gaol, till he makes fine and ranſom to the king. And moreover the juſtice or juſtices have power to ſummon a jury, to try the forcible entry or detainer complained of: and, if the ſame be found by that jury, then, beſides the fine on the offender, the juſtices ſhall make reſtitution by the ſheriff of the poſſeſſion, without inquiring into the merits of the title; for the force is the only thing to be tried, puniſhed, and remedied by them: and the ſame may be done by indictment at the general ſeſſions. But this proviſion does not extend to ſuch as endeavour to maintain poſſeſſion by force, where they themſelves, or their anceſtors, have been in the peaceable enjoyment of the lands and tenements, for three years immediately preceding [n]. [149]

9. THE offence of *riding* or *going armed*, with dangerous or unuſual weapons, is a crime againſt the public peace, by terrifying the good people of the land; and is particularly prohibited by the ſtatute of Northampton, 2 Edw. III. c. 3. upon pain of forfeiture of the arms, and impriſonment during the

[m] 1 Hawk. P. C. 141.

[n] Holding over by force, where the tenant's title was under a leaſe, now expired, is ſaid to be a forcible detainer. (Cro. Jac. 299.)

king's

king's pleasure: in like manner, as by the laws of Solon, every Athenian was finable who walked about the city in armour[o].

10. SPREADING *false news*, to make discord between the king and nobility, or concerning any great man of the realm, is punishable by common law[p] with fine and imprisonment; which is confirmed by statutes Westm. 1. 3 Edw. I. c. 34. 2 Ric. II. st. 1. c. 5. and 12 Ric. II. c. 11.

11. FALSE and *pretended prophecies*, with intent to disturb the peace, are equally unlawful, and more penal; as they raise enthusiastic jealousies in the people, and terrify them with imaginary fears. They are therefore punished by our law, upon the same principle that spreading of public news of any kind, without communicating it first to the magistrate, was prohibited by the antient Gauls[q]. Such false and pretended prophecies were punished capitally by statute 1 Edw. VI. c. 12. which was repealed in the reign of queen Mary. And now by the statute 5 Eliz. c. 15. the penalty for the first offence is a fine of ten pounds and one year's imprisonment; for the second, forfeiture of all goods and chattels, and imprisonment during life.

[150] 12. BESIDES actual breaches of the peace, any thing that tends to provoke or excite others to break it, is an offence of the same denomination. Therefore *challenges to fight*, either by word or letter, or to be the bearer of such challenge, are punishable by fine and imprisonment, according to the circumstances of the offence[r]. If this challenge arises on account of any money won at gaming, or if any assault or affray happen upon such account, the offender, by statute 9 Anne c. 14. shall forfeit all his goods to the crown, and suffer two years imprisonment.

[o] Pott. Antiq. b. 1. c. 26.

[p] 2 Inst. 226. 3 Inst. 198.

[q] "*Habent legibus sanctum, si quis "quid de republica a finitimis rumore aut "fama acceperit, uti ad magistratum de- "ferat, neve cum alio communicet: quod "saepe homines temerarios atque imperitos "falsis rumoribus terreri, et ad facinus im- "pelli, et de summis rebus consilium capere, "cognitum est.*" Caes. *de bell. Gall. lib.* 6. *cap.* 19.

[r] 1 Hawk. P. C. 135. 138.

13. OF

13. Of a nature very similar to challenges are *libels*, *libelli famosi*, which, taken in their largest and most extensive sense, signify any writings, pictures, or the like, of an immoral or illegal tendency; but, in the sense under which we are now to consider them, are malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule[u]. The direct tendency of these libels is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed. The communication of a libel to any one person is a publication in the eye of the law[r]: and therefore the sending an abusive private letter to a man is as much a libel as if it were openly printed, for it equally tends to a breach of the peace[s]. For the same reason it is immaterial with respect to the essence of a libel, whether the matter of it be true or false[t]; since the provocation, and not the falsity, is the thing to be punished criminally: though, doubtless, the falsehood of it may aggravate it's guilt, and enhance it's punishment (5). In a civil action, we may remember, a libel must appear to be false, as well as scandalous[w]; for, if the charge be true, the plaintiff has received no private injury, and has no ground to demand a compensation for himself, whatever offence it may be against the public peace: and [151] therefore, upon a civil action, the truth of the accusation may be pleaded in bar of the suit. But, in a criminal prosecution, the tendency which all libels have to create animosities, and to disturb the public peace, is the whole that the law considers. And therefore, in such prosecutions, the

[r] 2 Hawk. P. C. 193.
[s] Moor. 813.
[t] 2 Brown. 151. 12 Rep. 35 Hob. 215. Poph. 139. 2 Hawk. P. C. 195.
[u] Moor. 607. 5 Rep. 125. 21 Mod. 991.
[w] See Vol. III. pag. 125.

(5) Where truth is a greater provocation than falsehood, and therefore has a greater tendency to produce a breach of the public peace, there it is certainly true that the greater truth, the greater libel. *Asperis facetiis inlitus, quæ ubi multum ac vero hæsere, acrem sui memoriam relinquunt.* Tac. Ann. lib. 15. c. 68.

only

only points to be enquired into are, firſt, the making or publiſhing of the book or writing; and, ſecondly, whether the matter be criminal: and, if both theſe points are againſt the defendant, the offence againſt the public is complete. The puniſhment of ſuch libellers, for either making, repeating, printing, or publiſhing the libel, is fine, and ſuch corporal puniſhment as the court in it's diſcretion ſhall inflict; regarding the quantity of the offence, and the quality of the offender[x] (6). By the law of the twelve tables at Rome,

[x] 1 Hawk. P. C. 196.

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(6) Though it has been held, at leaſt for theſe two centuries, that the truth of a libel is no juſtification in a criminal proſecution, yet in many inſtances it is conſidered an extenuation of the offence; and the court of King's Bench has laid down this general rule, *viz.* that it will not grant an information for a libel, unleſs the proſecutor, who applies for it, makes an affidavit, aſſerting directly and pointedly, that he is innocent of the charge imputed to him. But this rule may be diſpenſed with, if the perſon libelled reſides abroad, or if the imputations of the libel are general and indefinite, or if it is a charge againſt the proſecutor for language which he has held in parliament. *Doug.* 271. 372.

It had frequently been determined by the court of King's Bench, that the only queſtions for the conſideration of the jury, in criminal proſecutions for libels, were the fact of publication, and the truth of the innuendos, that is, the truth of the meaning and ſenſe of the paſſages of the libel, as ſtated and averred in the record, and that the judge or court alone were competent to determine whether the ſubject of the publication was or was not a libel. See the caſe of the Dean of St. Aſaph, 3 *T. R.* 428. But the legality of this doctrine having been much controverted, the 32 Geo. III. c. 60. was paſſed, intituled *An act to remove doubts reſpecting the functions of juries in caſes of libels.* And it declares and enacts, that on every trial of an indictment or information for a libel, the jury may give a general verdict of guilty, or not guilty, upon the whole matter in iſſue, and ſhall not be required or directed by the judge to find the defendant guilty, merely on the proof of the publication of the paper charged to be a libel, and of the ſenſe aſcribed to it in the record. But the ſtatute provides, that the judge may give his opinion to the jury reſpecting the matter in iſſue, and the jury

libels, which affected the reputation of another, were made a capital offence: but, before the reign of Auguſtus, the puniſhment became corporal only [y]. Under the emperor Valentinian [z] it was again made capital, not only to write, but to publiſh, or even to omit deſtroying them. Our law, in this and many other reſpects, correſponds rather with the middle age of Roman juriſprudence, when liberty, learning, and humanity, were in their full vigour, than with the cruel edicts that were eſtabliſhed in the dark and tyrannical ages of the ancient *decemviri*, or the later emperors.

In this and the other inſtances which we have lately conſidered, where blaſphemous, immoral, treaſonable, ſchiſma-

[y] ——*Quinetiam lex*
Poenaque lata, malo quae nollet carmine quenquam
Deſcribi: —— *vertere modum formidine fuſtis.* Hor. *ad Aug.* 152.

[z] *Cod.* 9, 36.

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jury may at their diſcretion, as in other caſes, find a ſpecial verdict, and the defendant, if convicted, may move the court, as before the ſtatute, in arreſt of judgment. A perſon may be puniſhed for a libel reflecting on the memory and character of the dead, but it muſt be alleged, and proved to the ſatisfaction of the jury, that the author intended by the publication to bring diſhonour and contempt on the relations and deſcendants of the deceaſed. 4 *T. R.* 126. The ſale of the libel by a ſervant in a ſhop, is *prima facie* evidence of publication in a proſecution againſt the maſter, and is ſufficient for conviction, unleſs contradicted by contrary evidence, ſhewing that he was not privy, nor in any degree aſſenting to it. *Ibid.* and 5 *Burr.* 2686. When a perſon is brought to receive judgment, for a libel, his conduct, ſubſequent to his conviction, may be taken into conſideration, either by way of aggravation or mitigation of the puniſhment. 3 *T. R.* 432. And when Johnſon the bookſeller was brought up for judgment for having publiſhed a ſeditious libel, the Attorney-General produced an affidavit that the defendant after his conviction had publiſhed the ſame libel in the Analytical Review. *M. T.* 1798.

An information or an indictment need not ſtate that the libel is falſe, or that the offence was committed by force and arms. 7 *T. R.* 4.

tical,

tical, ſeditious, or ſcandalous libels are puniſhed by the Engliſh law, ſome with a greater, others with a leſs degree of ſeverity; the *liberty of the preſs*, properly underſtood, is by no means infringed or violated. The liberty of the preſs is indeed eſſential to the nature of a free ſtate; but this conſiſts in laying no *previous* reſtraints upon publications, and not in freedom from cenſure for criminal matter when pub-
[152] liſhed. Every freeman has an undoubted right to lay what ſentiments he pleaſes before the public: to forbid this, is to deſtroy the freedom of the preſs: but if he publiſhes what is improper, miſchievous, or illegal, he muſt take the conſequence of his own temerity. To ſubject the preſs to the reſtrictive power of a licenſer, as was formerly done, both before and ſince the revolution [a], is to ſubject all freedom of ſentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to puniſh (as the law does at preſent) any dangerous or offenſive writings, which, when publiſhed, ſhall on a fair and impartial trial be adjudged of a pernicious tendency, is neceſſary for the preſervation of peace and good order, of government and reli-

[a] The art of printing, ſoon after it's introduction, was looked upon (as well in England as in other countries) as merely a matter of ſtate, and ſubject to the coercion of the crown. It was therefore regulated with us by the king's proclamations, prohibitions, charters of privilege and of licence, and finally by the decrees of the court of ſtar-chamber; which limited the number of printers, and of preſſes which each ſhould employ, and prohibited new publications, unleſs previouſly approved by proper licenſers. On the demolition of this odious juriſdiction in 1641, the long parliament of Charles I. after their rupture with that prince, aſſumed the ſame powers as the ſtar-chamber exerciſed with reſpect to the licenſing of books: and in 1643, 1647, 1649, and 1652, (Scoboll. i. 44. 134. ii. 88. 230.) iſſued their ordinances for that purpoſe, founded principally on the ſtar-chamber decree of 1637. In 1662 was paſſed the ſtatute 13 & 14 Car. II. c. 33. which (with ſome few alterations) was copied from the parliamentary ordinances. This act expired in 1679, but was revived by ſtatute 1 Jac. II. c. 17. and continued till 1692. It was then continued for two years longer by ſtatute 4 W. & M. c. 24. but though frequent attempts were made by the government to revive it, in the ſubſequent part of that reign (Com. Journ. 11 Feb. 1694. 26 Nov. 1695. 22 Oct. 1696. 9 Feb. 1697. 31 Jan. 1698.), yet the parliament reſiſted it ſo ſtrongly, that it finally expired, and the preſs became properly free, in 1694; and has ever ſince ſo continued.

gion, the only ſolid foundations of civil liberty. Thus the will of individuals is ſtill left free; the abuſe only of that free will is the object of legal puniſhment. Neither is any reſtraint hereby laid upon freedom of thought or inquiry: liberty of private ſentiment is ſtill left; the diſſeminating, or making public, of bad ſentiments, deſtructive of the ends of ſociety, is the crime which ſociety corrects. A man (ſays a [153] fine writer on this ſubject) may be allowed to keep poiſons in his cloſet, but not publicly to vend them as cordials. And to this we may add, that the only plauſible argument heretofore uſed for the reſtraining the juſt freedom of the preſs, "that it was neceſſary to prevent the daily abuſe of it," will entirely loſe it's force, when it is ſhewn (by a ſeaſonable exertion of the laws) that the preſs cannot be abuſed to any bad purpoſe, without incurring a ſuitable puniſhment: whereas it never can be uſed to any good one, when under the controul of an inſpector. So true will it be found, that to cenſure the licentiouſneſs, is to maintain the liberty of the preſs (7).

(7) To this chapter it will be proper to annex the ſubſtance of an important act of parliament lately paſſed to ſecure the public peace, viz. the 39th Geo. III. c. 79. the preamble of which ſtates: "Whereas a traitorous conſpiracy has long been carried "on, in conjunction with the perſons from time to time exerciſing "the powers of government in France, to overturn the laws, con-"ſtitution, and government, and every exiſting eſtabliſhment, civil "and eccleſiaſtical, both in Great Britain and Ireland, and to diſ-"ſolve the connection between the two kingdoms, ſo neceſſary to "the ſecurity and proſperity of both: And whereas, in purſuance "of ſuch deſign, and in order to carry the ſame into effect, divers "ſocieties have been of late years inſtituted in this kingdom and in "the kingdom of Ireland, of a new and dangerous nature, incon-"ſiſtent with public tranquillity and with the exiſtence of regular "government, particularly certain ſocieties calling themſelves So-"cieties of United Engliſhmen, United Scotchmen, United Britons, "United Iriſhmen, and the London Correſponding Society: And "whereas the members of many of ſuch ſocieties have taken unlaw-"ful oaths and engagements of fidelity and ſecrecy, and uſed ſecret

" ſigns, and appointed committees, ſecretaries, and other officers, in " a ſecret manner; and many of ſuch ſocieties are compoſed of dif- " ferent diviſions, branches, or parts, which communicate with each " other by ſecretaries, delegates, or otherwiſe, and by means thereof " maintain an influence over large bodies of men, and delude many " ignorant and unwary perſons into the commiſſion of acts highly " criminal;" it therefore enacts that all theſe and other correſponding ſocieties ſhould be utterly ſuppreſſed and prohibited, as being unlawful combinations and confederacies.

And alſo every ſociety of which the members ſhall, according to the rules of the ſociety, be required to take an illegal oath or an oath not authoriſed by law, or ſhall ſubſcribe or aſſent to any teſt or declaration not required by law, or where the names of the members, or where the committees or preſidents choſen, are not known to the ſociety at large; and every ſociety, which ſhall conſiſt of different parts either acting ſeparately or having ſeparate preſidents or other officers, ſhall be deemed unlawful combinations and confederacies; and every perſon who ſhall become a member of ſuch a ſociety, or who ſhall correſpond with them, or ſhall aid or ſupport them with money or otherwiſe, ſhall be guilty of an unlawful combination and confederacy.

This does not extend to a declaration ſubſcribed to by a ſociety, which declaration ſhall be approved by two juſtices and afterwards confirmed at the quarter ſeſſions, nor to perſons who ſhall ceaſe to act as members of ſuch ſocieties after the paſſing of the act, nor to eſtabliſhed lodges of free maſons. But two members ſhall certify, and upon oath, that their ſociety has been uſually held as a lodge of free maſons, in conformity to the rules of free maſons in this kingdom; which certificate, and alſo an account of its place and times of meeting, and the names of all its members, ſhall be regiſtered with the clerk of the peace; and the juſtices at the ſeſſions, upon complaint made to them upon oath by any credible perſon that ſuch ſociety is likely to be injurious to the public peace and good order, may direct that the meetings of ſuch lodge be diſcontinued.

Perſons offending againſt this ſtatute may be proceeded againſt either in a ſummary way before one juſtice, or more, who may either fine the offender 20*l.* or impriſon him three calendar months, or they may be proſecuted by indictment; and upon conviction the court may tranſport for ſeven years, or impriſon for any time not exceeding two years.

The juſtices in a ſummary conviction may mitigate the puniſhment to one third. If any perſon ſhall permit the meeting of any illegal

illegal ſociety in his houſe, he ſhall forfeit 5*l.* for the firſt offence, and for the ſecond he ſhall be puniſhable as a member. And two juſtices, upon evidence on oath that any meeting has been held for a ſeditious purpoſe in a public houſe, may declare the licence forfeited, and from the day of ſuch declaration the licence is void and determined; and the owner of the houſe will be afterwards ſubject to penalties accordingly.

And becauſe many places were open for lectures and debates of a ſeditious and immoral nature, and other places uſed for ſeditious and immoral purpoſes under pretence of reading books, pamphlets, newſpapers, or other publications, it is enacted, that, all ſuch places where, under any pretence, money ſhall be received for admiſſion, ſhall be conſidered as diſorderly houſes, under the 36 Geo. III. c. 8. (ſee *ante*, *p.* 88. n. 9.) unleſs they are licenſed for any time not more than one year by two juſtices; which licence may be revoked by the juſtices at the quarter ſeſſions. Every alehouſe ſhall be deemed licenſed for reading publications; but upon evidence that publications of a ſeditious or immoral nature are uſually diſtributed in order to be read there, two juſtices may declare the licence void.

The act then ſtates that theſe ſocieties had publiſhed in great quantities, papers of an irreligious, treaſonable, and ſeditious nature, and had diſperſed them among the lower claſſes of the community, either gratis or at very low prices, and with an activity and profuſion beyond all former example, and that it was highly important to the public peace that it ſhould in future be known by whom any ſuch papers ſhall be printed; it therefore enacts, that every perſon having any printing preſs, or types for printing, and every perſon carrying on the buſineſs of a letter founder, or maker or ſeller of types for printing, or of printing preſſes, ſhall give notice thereof to the clerk of the peace, who ſhall tranſmit a copy to one of his majeſty's principal ſecretaries of ſtate; perſons omitting to give the notice required ſhall forfeit 20*l.*

And every perſon who ſhall ſell types or printing preſſes ſhall keep an account of all perſons to whom they ſhall be ſold, and ſhall produce ſuch an account at any time to any juſtice of the peace requiring the ſame, on penalty of 20*l.*

The printer ſhall print upon the front of every paper, which is printed on one ſide only, and upon the firſt and laſt leaves of every publication which contains more than one leaf, his name and place of abode, and in caſe of omiſſion ſhall forfeit for every copy pub-

liſhed 20*l.*; and every perſon, who prints for profit, ſhall keep one copy of every paper ſo printed, on which ſhall be written or printed the name and place of abode of the perſon, by whom ſuch printer ſhall be employed, and ſhall produce the ſame to any juſtice of the peace who within the ſpace of ſix months ſhall require to ſee the ſame, and upon neglect or refuſal ſhall forfeit 20*l.*

Any perſon may apprehend thoſe who are publiſhing papers without the name and abode of the printer, and may convey them, or deliver them to a conſtable to convey, to a magiſtrate to be examined; and a peace officer, by a warrant from a juſtice of the peace, may enter any houſe or room to ſearch for any printing preſs or types ſuſpected to be kept or uſed without the notice required by the act, and to ſeize and carry them away, together with all printed papers found in ſuch houſe or room.

CHAPTER THE TWELFTH.

OF OFFENCES AGAINST PUBLIC TRADE.

OFFENCES againſt public *trade*, like thoſe of the preceding claſſes, are either felonious, or not felonious. Of the firſt ſort are,

1. OWLING, ſo called from it's being uſually carried on in the night, which is the offence of tranſporting wool or ſheep out of this kingdom, to the detriment of it's ſtaple manufacture. This was forbidden at common law [a], and more particularly by ſtatute 11 Edw. III. c. 1. when the importance of our woollen manufacture was firſt attended to; and there are now many later ſtatutes relating to this offence, the moſt uſeful and principal of which are thoſe enacted in the reign of queen Elizabeth, and ſince. The ſtatute 8 Eliz. c. 3. makes the tranſportation of live ſheep, or embarking them on board any ſhip, for the firſt offence forfeiture of goods, and impriſonment for a year, and that at the end of the year the left hand ſhall be cut off in ſome public market, and ſhall be there nailed up in the openeſt place; and the ſecond offence is felony. The ſtatutes 12 Car. II. c. 32. and 7 & 8 W. III. c. 28. make the exportation of wool, ſheep, or fuller's earth, liable to pecuniary penalties, and the forfeiture of the intereſt of the ſhip and cargo by the owners, if privy; and confiſcation of goods, and three years impriſonment to the maſter and all the mariners. And the ſtatute 4 Geo. I. c. 11. (amended and farther enforced by 12 Geo. II.

[a] Mir. c. 1. § 3.

c. 21. and 19 Geo. II. c. 34.) makes it tranſportation for ſeven years, if the penalties be not paid (1).

2. SMUGGLING, or the offence of importing goods without paying the duties impoſed thereon by the laws of the cuſ-
[155] toms and exciſe, is an offence generally connected and carried on hand in hand with the former. This is reſtrained by a great variety of ſtatutes, which inflict pecuniary penalties and ſeiſure of the goods for clandeſtine ſmuggling; and affix the guilt of felony, with tranſportation for ſeven years, upon

(1) By the 28 Geo. III. c. 38. all the former ſtatutes reſpecting the exportation of ſheep and wool are repealed, and an infinite variety of regulations and reſtrictions upon the ſubject is conſolidated in that ſtatute, which it behoves the dealers in, and carriers of, wool to pay particular attention to. It is given almoſt at length in the 4th vol. of *Burn*, tit. Woollen Manufacture, c. II. but as it contains near one hundred long clauſes, it is impoſſible to give any adequate repreſentation of it in an abridgment. The principal prohibitions are, that if any perſon ſhall ſend or receive any ſheep on board a ſhip or veſſel, to be carried out of the kingdom, the ſheep and veſſel are both forfeited, and the perſon ſo offending ſhall forfeit 3 *l.* for every ſheep, and ſhall ſuffer ſolitary impriſonment for three months. But wether ſheep, by a licence from the collector of the cuſtoms, may be taken on board for the uſe of the ſhip's company. And every perſon, who ſhall export out of the kingdom, any wool, or woollen articles ſlightly made up, ſo as eaſily to be reduced to wool again, or any fuller's earth, or tobacco-pipe clay, and every carrier, ſhip owner, commander, mariner, or other perſon, who ſhall knowingly aſſiſt in exporting, or in attempting to export, theſe articles, ſhall forfeit 3 *s.* for every pound weight, or the ſum of 50 *l.* in the whole, at the election of the proſecutor, and ſhall alſo ſuffer ſolitary impriſonment for three months. But wool may be carried coaſtwiſe upon being duly entered, and ſecurity being given, according to the directions of the ſtatute, to the officer of the port from whence the ſame ſhall be conveyed. And the owners of ſheep, which are ſhorn within five miles of the ſea, or within ten miles in Kent and Suſſex, cannot remove the wool without giving notice to the officer of the neareſt port, as directed by the ſtatute.

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more open, daring, and avowed practices: but the laſt of them, 19 Geo. II. c. 34. is for this purpoſe *inſtar omnium*; for it makes all forcible acts of ſmuggling, carried on in defiance of the laws, or even in diſguiſe to evade them, felony without benefit of clergy: enacting, that if three or more perſons ſhall aſſemble, with fire-arms or other offenſive weapons, to aſſiſt in the illegal exportation or importation of goods, or in reſcuing the ſame after ſeiſure, or in reſcuing offenders in cuſtody for ſuch offences; or ſhall paſs with ſuch goods in diſguiſe; or ſhall wound, ſhoot at, or aſſault any officers of the revenue when in the execution of their duty; ſuch perſons ſhall be felons without the benefit of clergy. As to that branch of the ſtatute, which required any perſon, charged upon oath as a ſmuggler, under pain of death, to ſurrender himſelf upon proclamation, it ſeems to be expired; as the ſubſequent ſtatutes [b], which continue the original act to the preſent time, do in terms continue only ſo much of the ſaid act as relates to the *puniſhment* of the offenders, and not to the extraordinary method of apprehending or cauſing them to ſurrender: and for offences of this poſitive ſpecies, where puniſhment (though neceſſary) is rendered ſo by the laws themſelves, which by impoſing high duties on commodities increaſe the temptation to evade them, we cannot ſurely be too cautious in inflicting the penalty of death [c] (2).

[b] Stat. 26 Geo. I. c. 32. 32 Geo. II. c. 18. 4 Geo. III. c. 12.

[c] See Vol. I. p. 317. Beccar. c. 33.

(2) But the 19 Geo. III. c. 69. ſec. 23. has expreſsly declared that the *method of apprehending* the offenders deſcribed in the 19 Geo. II. c. 34. and of *cauſing them to ſurrender*, is continued by all the ſtatutes, which have continued the 19 Geo. II. c. 34. and it is alſo recited at length in the 24 Geo. III. ſeſſ. 2. c. 47. and is there directed to be enforced for procuring the apprehending of the capital felons deſcribed by that ſtatute, who are perſons who ſhall maliciouſly ſhoot into any ſhip or boat, or at any cuſtom-houſe officer or his aſſiſtant, in the execution of his duty, either on ſhore or within four leagues of it.

It is equivalent to an attainder by outlawry, and is thus deſcribed. When any perſon ſhall be charged with any the ſaid offences,

3. ANOTHER offence againſt public trade is fraudulent *bankruptcy*, which was ſufficiently ſpoken of in a former volume[d]; I ſhall therefore here barely mention the ſeveral ſpecies of fraud, taken notice of by the ſtatute law; *viz.* the bankrupt's neglect of ſurrendering himſelf to his creditors; his non-conformity to the directions of the ſeveral ſtatutes; his concealing or embezzling his effects to the value of 20*l*: and his withholding any books or writings with intent to defraud his creditors: all which the policy of our commercial country has made felony without benefit of clergy[e]. And indeed it is allowed by ſuch as are the moſt averſe to the infliction of capital puniſhment, that the offence of fraudulent bankruptcy, being an atrocious ſpecies of the *crimen falſi*, ought to be put upon a level with thoſe of forgery and falſifying the coin[f]. And, even without actual fraud, if the bankrupt can-

[d] See Vol. II. pag. 481, 482.
[e] Stat. 5 Geo. II. c. 30.
[f] Beccar. ch. 34.

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fences, before a juſtice of the peace, by information on oath, the juſtice ſhall certify the ſame under his hand and ſeal, and return the information to a ſecretary of ſtate, who ſhall lay the ſame before the king in council; who may thereon make his order, commanding the offender to ſurrender in forty days after the firſt publication thereof in the gazette, to one of the judges of the king's bench or a juſtice of the peace, who thereon ſhall commit him to goal, to anſwer the charge againſt him according to due courſe of law: which order the clerks of the privy council ſhall cauſe to be forthwith publiſhed in the two ſucceſſive gazettes, and to be tranſmitted to the ſheriff where the offence was committed; who ſhall in fourteen days cauſe the ſame to be proclaimed between ten in the morning and two in the afternoon, in the market places, on the market days, of two market towns in the ſame county, near the place where the offence was committed; and a copy of the order ſhall be affixed on ſome public place in the ſaid towns; and if ſuch offender ſhall not ſurrender purſuant to ſuch order, or eſcape after ſurrender, he ſhall be attainted of felony without benefit of clergy. See an inſtance in *Foſt.* 51. where the attorney-general prayed the judgment of the court of king's bench under this ſtatute; but the priſoner was diſcharged becauſe the directions of the ſtatute had not been duly obſerved.

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not make it appear that he is disabled from paying his debts by some casual loss, he shall by the statute 21 Jac. I. c. 19. be set on the pillory for two hours, with one of his ears nailed to the same, and cut off. To this head we may also subjoin, that by statute 32 Geo. II. c. 28. it is felony punishable by transportation for seven years, if a prisoner, charged in execution for any debt under 100 *l.* neglects or refuses on demand to discover and deliver up his effects for the benefit of his creditors (3). And these are the only felonious offences against public trade; the residue being mere misdemesnors: as,

4. USURY, which is an unlawful contract upon the loan of money, to receive the same again with exorbitant increase. Of this also we had occasion to discourse at large in a former volume[*]. We there observed that by statute 37 Hen. VIII. c. 9. the rate of interest was fixed at 10 *l. per cent. per annum*, which the statute 13 Eliz. c. 8. confirms; and ordains, that all brokers shall be guilty of a *praemunire* that transact any contracts for more, and the securities themselves shall be void. The statute 21 Jac. I. c. 17. reduced interest to eight *per cent.*; [157] and, it having been lowered in 1650, during the usurpation, to six *per cent.* the same reduction was re-enacted after the restoration by statute 12 Car. II. c. 13. and lastly, the statute 12 Ann. st. 2. c. 16. has reduced it to five *per cent.* Wherefore not only all contracts for taking more are in themselves totally void, but also the lender shall forfeit treble the money borrowed (4). Also if any scrivener or broker

[*] See Vol. II. pag. 455, *&c.*

(3) By the 33 Geo. III. c. 5. the debt is enlarged to 300 *l.*

(4) One half of the penalty is given by the statute to the prosecutor, the other half to the king.—It is remarkable, that such was the prejudice in antient times against lending money upon interest, that the first statute, the 37 Hen. VIII. c. 9. by which it was legalized, was afterwards repealed by 5 & 6 Edw. VI. c. 20. by which all interest was prohibited, the money lent and the interest were forfeited, and the offender was subject to fine and imprisonment.—A learned author has displayed much ingenuity in arguing against the policy of the limits of interest upon a contract for the loan of money, but Cato was of a different opinion. *Cum ille,*

takes more than five ſhillings *per cent.* procuration-money, or more than twelve-pence for making a bond, he ſhall forfeit

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ille, qui quæſierat, dixiſſet, Quid fœnerari? Tum Cato, Quid hominem, inquit, occidere? Cic. Off.

It is not neceſſary, that money ſhould be actually advanced to conſtitute the offence of uſury, but any contrivance or pretence whatever to gain more than legal intereſt, where it is the intent of the parties to contract for a loan, will be uſury; as where a perſon applies to a tradeſman to lend him money, who, inſtead of caſh, furniſhes him with goods, to be paid for at a future day, but at ſuch an exorbitant price, as to ſecure to himſelf more than legal intereſt upon the amount of their intrinſic value, this is an uſurious contract. The queſtion of uſury, or whether a contract is a colour and pretence for an uſurious loan, or is a fair and honeſt tranſaction, muſt under all its circumſtances be determined by a jury, ſubject to the correction of the court by a new trial. *Cowp.* 112. 770. *Doug.* 708. 3 *T. R.* 531.

It is now clearly ſettled that bankers and other perſons diſcounting bills, may not only take 5*l. per cent.* for intereſt, but alſo a reaſonable ſum beſides, for their trouble and riſk in remitting caſh, and for other incidental expences. 3 *T. R.* 52. But ſtill whether ſuch a charge is reaſonable or uſurious, muſt be decided by a jury, aſſiſted by the direction of the judge. If a contract is entered into, to pay more than legal intereſt, though all ſecurities are immediately void, yet the penalty is not incurred till more than legal intereſt is actually paid. *Doug.* 223.

But in order to avoid a ſecurity, it muſt be ſhewn that the agreement was in its origin illegal and uſurious: it will not be uſury, if more than legal intereſt is afterwards paid, if not originally agreed for. 3 *Anſt.* 940.

If a banker deducts the diſcount of 5*l. per cent.* upon a bill, and, inſtead of paying the remainder in caſh, gives a draft for it even at a ſhort date, this has been held to be uſury; for he not only gains 5 *per cent.* but alſo the further benefit of the money till that draft is paid. If a perſon diſcounts a bill, and takes more than legal intereſt, he cannot be proſecuted for the penalty till that bill is paid in money, or money's worth, or receives ſo much of it as with the diſcount will amount to more than legal intereſt for the money he advanced. If when the bill is due, he receives only another bill in payment, the penalty cannot be incurred till the

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20*l.* with coſts, and ſhall ſuffer impriſonment for half a year. And by ſtatute 17 Geo. III. c. 26. to take more than ten ſhillings *per cent.* for procuring any money to be advanced on any life-annuity, is made an indictable miſdemeſnor, and puniſhable with fine and impriſonment: as is alſo the offence of procuring or ſoliciting any infant to grant any life-annuity; or to promiſe, or otherwiſe engage, to ratify it when he comes of age.

5. CHEATING is another offence, more immediately againſt public trade: as that cannot be carried on without a punctilious regard to common honeſty, and faith between man and man. Hither therefore may be referred that prodigious multitude of ſtatutes, which are made to reſtrain and puniſh deceits in particular trades, and which are enumerated by Hawkins and Burn, but are chiefly of uſe among the traders themſelves. The offence alſo of *breaking the aſſiſe* of bread, or the rules laid down by law, and particularly by ſtatutes 31 Geo. II. c. 29. 3 Geo. III. c. 11. and 13 Geo. III. c. 62. for aſcertaining it's price in every given quantity, is reducible to this head of cheating: as is likewiſe in a peculiar manner the offence of ſelling by *falſe weights and meaſures*; the ſtandard of which fell under

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ſecond bill is diſcharged. *Maddock* v. *Hammett and others.* 7 *T. R.* 184.

The borrower of the money is a competent witneſs to prove the uſury in a penal action againſt the lender, though he has not repaid the money; for the borrower could not give in evidence the verdict in that action, if an action were brought againſt him by the lender. *Smith* v. *Prager*, 7 *T. R.* 60.

But in criminal proſecutions for forgery, no one can prove a bill of exchange, bond, or other inſtrument a forgery, which, if valid, he would be liable to pay, unleſs he is releaſed by the perſon to whom he is ſo apparently bound and anſwerable. *Doctor Dod's caſe*, *Leach.* 141. And this ſtill continues the practice in criminal courts.

See more upon uſury, 1 vol. p. 463.

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our conſideration in a former volume [h] (5). The puniſhment of bakers, breaking the aſſiſe, was antiently to ſtand in the pillory, by ſtatute 51 Hen. III. ſt. 6. and for brewers (by the ſame act) to ſtand in the tumbrel or dungcart [i]: which, as we learn from domeſday book, was the puniſhment for knaviſh brewers in the city of Cheſter ſo early as the reign of Edward the confeſſor. "*Malam cerevisiam faciens, in cathedra ponebatur ſtercoris.*" But now the general puniſhment for all

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[h] See Vol. I. pag. 274.
[i] 3 Inſt. 219.
[j] Seld. tit. of hon. b. 2. c. 5. § 3.

(5) Two acts have been lately paſſed for the prevention of falſe weights and balances; viz. the 35 Geo. III. c. 102. and the 37 Geo. III. c. 143.—The latter materially alters the former.

By theſe it is enacted, that the juſtices at the petty ſeſſions may appoint one perſon or more to examine the weights and balances within their diſtrict. Theſe inſpectors ſhall be ſworn to the faithful diſcharge of their office; and, as often as the juſtices ſhall direct, ſhall enter into any ſhop, mill, houſe, ſtall, or other premiſes of any perſon who ſhall ſell by retail and weight, to ſearch for and examine his weights and balances, and ſhall ſeize thoſe which are not according to the ſtandard in the Exchequer, and to bring them before the juſtices at their petty ſeſſions; and the offender being there convicted ſhall forfeit not leſs than 5 *s.* nor more than 20 *s.* at the diſcretion of the juſtices, together with coſts, to be levied by diſtreſs. The falſe weights and balances are to be broken, and the materials ſold. And whoever obſtructs the inſpectors in the execution of their duty, or ſhall refuſe to produce his weights and balances to them, ſhall forfeit from 5 *s.* to 40 *s.*

The inhabitants of any pariſh, townſhip, or place may at a veſtry meeting nominate any ſubſtantial houſeholder or houſeholders, who, if approved of by the juſtices, ſhall be the inſpectors within that pariſh, townſhip, or place; but ſuch nomination cannot be made till the inhabitants have procured ſtandard weights to be paid for out of their poor-rates. The juſtices at the quarter-ſeſſions ſhall fix the allowance of the inſpectors to be paid out of the county rate.

And they ſhall alſo order to be purchaſed out of the county rate ſtandard weights, to be depoſited with proper perſons and in convenient places, which ſhall be produced to any perſon paying a reaſonable ſum for producing the ſame.

Proſecutions muſt commence within one month after the offence.

frauds of this kind, if indicted (as they may be) at common law, is by fine and imprisonment: though the easier and more usual way is by levying on a summary conviction, by distress and sale, the forfeitures imposed by the several acts of parliament. Lastly, any deceitful practice, in cozening another by artful means, whether in matters of trade, or otherwise, as by playing with false dice, or the like, is punishable with fine, imprisonment, and pillory [k]. And by the statutes 33 Hen. VIII. c. 1. and 30 Geo. II. c. 24. if any man defrauds another of any valuable chattels by colour of any false token, counterfeit letter, or false pretence, or pawns or disposes of another's goods without the consent of the owner, he shall suffer such punishment by imprisonment, fine, pillory, transportation, whipping, or other corporal pain, as the court shall direct (6).

6. THE offence of *forestalling* the market is also an offence against public trade. This, which (as well as the two following) is also an offence at common law [l], was described by statute 5 & 6 Edw. VI. c. 14. to be the buying or contracting for any merchandize or victual coming in the way to market; or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price, when there: any of which practices make the market dearer to the fair trader.

7. REGRATING was described by the same statute to be the buying of corn, or other dead victual, in any market, and selling it again in the same market, or within four miles of the place. For this also enhances the price of the provisions, as every successive seller must have a successive profit.

8. ENGROSSING was also described to be the getting into one's possession, or buying up, large quantities of corn or

[k] 1 Hawk. P. C. 183. [l] *Ibid.* 234.

(6) In an indictment for this offence, the false pretences must be particularly stated and specified. *The King* v. *Mason*, 2 *T. R.* 581.

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other dead victuals, with intent to ſell them again. This muſt of courſe be injurious to the public, by putting it in the power of one or two rich men to raiſe the price of proviſions at their own diſcretion: And ſo the total engroſſing of any [159] other commodity, with intent to ſell it at an unreaſonable price, is an offence indictable and finable at the common law[m]. And the general penalty for theſe three offences by the common law (for all the ſtatutes concerning them were repealed by 12 Geo. III. c. 71.) is, as in other minute miſdemeſnors, diſcretionary fine and impriſonment[n]. Among the Romans theſe offences and other mal-practices to raiſe the price of proviſions, were puniſhed by a pecuniary mulct. "*Poena vi-*" *ginti aureorum ſtatuitur adverſus eum, qui contra annonam* " *fecerit, ſocietatemve coierit quo annona carior fiat*[o]."

9. MONOPOLIES are much the ſame offence in other branches of trade, that engroſſing is in proviſions: being a licence or privilege allowed by the king for the ſole buying and ſelling, making, working, or uſing of any thing whatſoever; whereby the ſubject in general is reſtrained from that liberty of manufacturing or trading which he had before[p]. Theſe had been carried to an enormous height during the reign of queen Elizabeth; and were heavily complained of by ſir Edward Coke[q], in the beginning of the reign of king James the firſt: but were in great meaſure remedied by ſtatute 21 Jac. I. c. 3. which declares ſuch monopolies to be contrary to law and void; (except as to patents, not exceeding the grant of fourteen years, to the authors of new inventions (7); and except alſo patents concerning printing, ſaltpetre, gunpowder, great ordnance, and ſhot;) and monopoliſts are puniſhed with the forfeiture of treble damages and double coſts, to thoſe whom they attempt to diſturb; and if

[m] Cro. Car. 232.
[n] 1 Hawk. P. C. 235.
[o] *Ff.* 48. 12. 2.
[p] 1 Hawk. P. C. 232.
[q] 3 Inſt. 181.

(7) See an account of patents for new inventions, 2 vol. p. 407. n. 7.

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they procure any action, brought againſt them for theſe damages, to be ſtayed by any extrajudicial order, other than of the court wherein it is brought, they incur the penalties of a *praemunire*. Combinations alſo among victuallers or artificers, to raiſe the price of proviſions, or any commodities, or the rate of labour, are in many caſes ſeverely puniſhed by particular ſtatutes; and, in general, by ſtatute 2 & 3 Edw. VI. c. 15. with the forfeiture of 10 *l.* or twenty days impriſonment, with an allowance of only bread and water, for the firſt offence; 20 *l.* or the pillory, for the ſecond; and 40 *l.* for the third, or elſe the pillory, loſs of one ear, and perpetual infamy. In the ſame manner, by a conſtitution of [160] the emperor Zeno[r], all monopolies and combinations to keep up the price of merchandize, proviſions, or workmanſhip, were prohibited, upon pain of forfeiture of goods and perpetual baniſhment (8).

[r] *Cod.* 4. 59. 1.

(8) Theſe combinations are conſpiracies by the common law, and are puniſhable as miſdemeſnors at the diſcretion of the court. (*See ante, p.* 136. *n.* 4.)

The moſt common combination is that of journeymen manufacturers to obtain an advance of wages.

Any one workman may refuſe to work till he is paid the price he pleaſes to fix upon his own labour; but if two or more enter into an engagement of this kind, ſuch aſſociations being ſo injurious to the intereſts of the public, they are guilty of a conſpiracy, and may be proſecuted by an indictment or an information. But combinations amongſt workmen had become ſo frequent that it was thought expedient to repreſs them by a ſpeedier proceſs, and therefore the 39 Geo. III. c. 81. enacted, that every perſon combining with others to advance their wages, or decreaſe the quantity of work, or any way to affect or control thoſe who carried on any manufacture or trade in the conduct and management thereof, might be convicted before one juſtice of the peace, and might be committed to the common gaol for any time not exceeding three calendar months, or be kept to hard labour in the houſe of correction for two months.

10. To exercise a *trade* in any town, without having previously served as an *apprentice* for seven years [s], is looked upon to be detrimental to public trade, upon the supposed want of sufficient skill in the trader: and therefore is punished by statute 5 Eliz. c. 4. with the forfeiture of forty shillings by the month (9).

11. LASTLY, to prevent the destruction of our home manufactures, by *transporting and seducing our artists* to settle abroad, it is provided by statute 5 Geo. I. c. 27. that such as so entice or seduce them shall be fined 100 *l.* and be imprisoned three months; and for the second offence shall be fined at discretion, and be imprisoned a year: and the artificers, so going into foreign countries, and not returning within six months after warning given them by the British ambassador where they reside, shall be deemed aliens, and forfeit all their lands and goods, and shall be incapable of any legacy or gift. By statute 23 Geo. II. c. 13. the seducers incur, for the first offence, a forfeiture of 500 *l.* for each artificer contracted with to be sent abroad, and imprisonment for twelve months; and for the second, 1000 *l.* and are liable to two years imprisonment: and by the same statute, connected with 14 Geo. III. c. 71. if any person exports any tools or utensils used in the silk, linen, cotton, or woollen manufactures, (excepting woolcards to North America [t],) he forfeits the same and 200 *l.* and the captain of the ship (having knowlege thereof) 100 *l.* and if any captain of a king's ship, or officer of the customs, knowingly suffers such export-

[s] See Vol. I. page 427. [t] Stat. 15 Geo. III. c. 5.

(9) If indentures of apprenticeship are for a less term than seven years, it has been held that they may at any time be avoided by the parties, and no person whatsoever is bound by any covenants in them. 1 *Anst.* 256. Yet forty days residence under them will gain the apprentice a settlement. *Burr. Sett. Cas.* 91.

See this subject more fully stated in 1 vol. p. 428. n. 7. and p. 417. n. 7.

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ation, he forfeits 100 *l.* and his employment; and is for ever made incapable of bearing any public office: and every perſon collecting ſuch tools or utenſils, in order to export the ſame, ſhall, on conviction at the aſſiſes, forfeit ſuch tools and alſo 200 *l.* (10)

(10) By the ſtatute 21 Geo. III. c. 3. if any perſon ſhall put on board any ſhip, not bound to any place in Great Britain or Ireland, or ſhall have in his cuſtody, with intent to export, any engine, tool, or implement, uſed in the woollen, cotton, linen, or ſilk manufactures, he ſhall forfeit the ſame, and alſo the ſum of 200 *l.* and ſhall be impriſoned twelve months and till the forfeiture is paid. And every captain and cuſtom-houſe officer, who ſhall knowingly receive ſuch an article, or take an entry of it, ſhall forfeit 200*l.* By 22 Geo. III. c. 60. if any perſon ſhall entice or encourage any artificer, employed in printing callicoes, cottons, muſlins, or linens, to leave the kingdom, he ſhall forfeit 500 *l.* and be impriſoned one year. And perſons who export, or attempt to export, any engines or implements uſed in that manufacture, ſhall forfeit 500*l.* Captains of ſhips, and cuſtom-houſe officers, conniving at theſe offences, forfeit 100*l.* and become incapable of holding any office under the crown.

By the 25 Geo. III. c. 67. any perſon, who entices or encourages an artificer in the iron and ſteel manufactures, to leave the kingdom, ſhall forfeit 500 *l.* and be impriſoned for one year. And perſons who attempt to export any inſtruments ſpecified by name in the 26 Geo. III. c. 89. ſhall forfeit 200 *l.* and be impriſoned one year. And captains and cuſtom-houſe officers, conniving at the offence, are ſubject to the ſame penalty, and become incapable of exerciſing any public employment.

CHAPTER THE THIRTEENTH.

OF OFFENCES AGAINST THE PUBLIC HEALTH, AND THE PUBLIC POLICE OR OECONOMY.

THE fourth ſpecies of offences, more eſpecially affecting the commonwealth, are ſuch as are againſt the public *health* of the nation; a concern of the higheſt importance, and for the preſervation of which there are in many countries ſpecial magiſtrates or curators appointed.

1. THE firſt of theſe offences is a felony; but, by the bleſſing of Providence for more than a century paſt, incapable of being committed in this nation. For by ſtatute 1 Jac. I. c. 31. it is enacted, that if any perſon infected with the plague, or dwelling in any infected houſe, be commanded by the mayor or conſtable, or other head officer of his town or vill, to keep his houſe, and ſhall venture to diſobey it; he may be enforced, by the watchmen appointed on ſuch melancholy occaſions, to obey ſuch neceſſary command: and, if any hurt enſue by ſuch inforcement, the watchmen are thereby indemnified. And farther, if ſuch perſon ſo commanded to confine himſelf goes abroad, and converſes in company, if he has no plague ſore upon him, he ſhall be puniſhed as a vagabond by whipping, and be bound to his good behaviour: but, if he has any infectious ſore upon him, uncured, he then ſhall be guilty of felony. By the ſtatute 26 Geo. II. c. 26. (explained and amended by 29 Geo. II. c. 8. (1),) the

(1) And further enforced and regulated by 28 Geo. III. c. 54.

method

method of performing *quarantine*, or forty days probation, by ships coming from infected countries, is put in a much more regular and effectual order than formerly, and masters of ships coming from infected places and disobeying the directions there given, or having the plague on board and concealing it, are guilty of felony without benefit of clergy. The same penalty also attends persons escaping from the *lazarets*, or [162] places wherein quarantine is to be performed; and officers and watchmen neglecting their duty; and persons conveying goods or letters from ships performing quarantine (2).

2. A SECOND, but much inferior species, of offence against public health is the selling of *unwholesome provisions*. To prevent which the statute 51 Hen. III. st. 6. and the ordinance for bakers, c. 7. prohibit the sale of corrupted wine, contagious or unwholesome flesh, or flesh that is bought of a Jew; under pain of amercement for the first offence, pillory for the second, fine and imprisonment for the third, and abjuration of the town for the fourth. And by the statute 12 Car. II. c. 25. § 11. any brewing or adulteration of wine is punished with the forfeiture of 100*l.* if done by the wholesale merchant; and 40*l.* if done by the vintner or retail trader. These are all the offences which may properly be said to respect the public health.

V. THE last species of offences which especially affect the commonwealth, are those against the public *police* and *economy*.

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(2) If the captain quits the ship himself, or permits any other person to quit it, he forfeits 500*l.* and every other person quitting it shall suffer six months imprisonment, and shall forfeit 200*l.* It has been decided in a late case that if a pilot leaves the ship contrary to an order of the king in council, though perhaps liable to the last mentioned penalty, yet under the first clause of 26 Geo. II. c. 6. which contains a general prohibition without any specific penalty, he may be punished at the discretion of the court; and in that case the defendant was ordered to be imprisoned for a year, 4 *T. R.* 206. See the regulations and directions, which are numerous, for the performance of quarantine, in 3 *Burn.* tit. Plague.

By the public police and oeconomy I mean the due regulation and domeſtic order of the kingdom: whereby the individuals of the ſtate, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners; and to be decent, induſtrious, and inoffenſive in their reſpective ſtations. This head of offences muſt therefore be very miſcellaneous, as it comprizes all ſuch crimes as eſpecially affect public ſociety, and are not comprehended under any of the four preceding ſpecies. Theſe amount, ſome of them to felony, and others to miſdemeſnors only. Among the former are,

1. THE offence of *clandeſtine marriages*: for by the ſtatute 26 Geo. II. c. 33. 1. To ſolemnize marriage in any other place beſides a church, or public chapel wherein banns have been uſually publiſhed, except by licence from the archbiſhop of Canterbury;—and, 2. To ſolemnize marriage in ſuch church or chapel without due publication of banns, or
[163] licence obtained from a proper authority;—do both of them not only render the marriage void, but ſubject the perſon ſolemnizing it to felony, puniſhed by tranſportation, for fourteen years: as, by three former ſtatutes[a], he and his aſſiſtants were ſubject to a pecuniary forfeiture of 100 *l.* 3. To make a falſe entry in a marriage regiſter; to alter it when made; to forge, or counterfeit, ſuch entry, or a marriage licence; to cauſe or procure, or act or aſſiſt in ſuch forgery; to utter the ſame as true, knowing it to be counterfeit; or to deſtroy or procure the deſtruction of any regiſter, in order to vacate any marriage, or ſubject any perſon to the penalties of this act; all theſe offences, knowingly and wilfully committed, ſubject the party to the guilt of felony without benefit of clergy.

2. ANOTHER felonious offence, with regard to this holy eſtate of matrimony, is what ſome have corruptly called

[a] 6 & 7 W. III. c. 6. 7 & 8 W. III. c. 35. 10 Ann. c. 19 § 176.

bigamy,

bigamy, which properly ſignifies being twice married; but is more juſtly denominated *polygamy*, or having a plurality of wives at once[b]. Such ſecond marriage, living the former huſband or wife, is ſimply void, and a mere nullity, by the eccleſiaſtical law of England: and yet the legiſlature has thought it juſt to make it felony, by reaſon of its being ſo great a violation of the public oeconomy and decency of a well ordered ſtate. For Polygamy can never be endured under any rational civil eſtabliſhment, whatever ſpecious reaſons may be urged for it by the eaſtern nations, the fallaciouſneſs of which has been fully proved by many ſenſible writers: but in northern countries the very nature of the cli- [164] mate ſeems to reclaim againſt it: it never having obtained in this part of the world, even from the time of our German anceſtors, who, as Tacitus informs us[c], "*prope ſoli barbarorum ſingulis uxoribus contenti ſunt.*" It is therefore puniſhed by the laws both of antient and modern Sweden with death[d]. And with us in England it is enacted by ſtatute 1 Jac. I. c. 11. that if any perſon, being married, do afterwards marry again, the former huſband or wife being alive, it is felony; but within the benefit of clergy. The firſt wife in this caſe ſhall not be admitted as a witneſs againſt her huſband, becauſe ſhe is the true wife; but the ſecond may, for ſhe is indeed no wife at all[e]: and ſo, *vice verſa*, of a ſecond huſband. This act makes an exception to five caſes, in which ſuch ſecond marriage, though in the three firſt it is void, is yet no felony[f].

[b] 3 Inſt. 88. Bigamy, according to the canoniſts, conſiſted in marrying two virgins ſucceſſively, one after the death of the other, or in once marrying a widow. Such were eſteemed incapable of orders, &c.; and by a canon of the council of Lyons, *A. D.* 1274, held under pope Gregory X. were *omni privilegio clericali nudati et coercioni fori ſecularis addicti.* (6 *Decretal. l.* 12.) This canon was adopted and explained in England, by ſtatute 4 Edw. I. ſt. 3. c. 5. and *bigamy* thereupon became no uncommon counterplea to the claim of the benefit of clergy. (*M.* 40 *Edw. III.* 42. *M.* 11 *Hen. IV.* 11. 48. *M.* 13 *Hen. IV.* 6. Staunf. P. C. 134.) The cognizance of the plea of *bigamy* was declared by ſtatute 18 Edw. III. ſt. 3. c. 2. to belong to the court chriſtian, like that of *baſtardy*. But by ſtat. 1 Edw. VI. c. 12. § 16. *bigamy* was declared to be no longer an impediment to the claim of clergy. See Dal. 21. Dyer 201.

[c] *de mor. Germ.* 18.

[d] Stiernh. *de jure Sueon. l.* 3. *c.* 2.

[e] 1 Hal. P. C. 693.

[f] 3 Inſt. 89. Kel. 27. 1 Hal. P. C. 694.

1. Where either party hath been continually *abroad* for ſeven years, whether the party in England hath notice of the other's being living or no. 2. Where either of the parties hath been abſent from the other ſeven years *within* this kingdom, and the remaining party hath had no knowlege of the other's being alive within that time. 3. Where there is a divorce (or ſeparation *a menſa et thoro*) by ſentence in the eccleſiaſtical court (3). 4. Where the firſt marriage is declared abſolutely void by any ſuch ſentence, and the parties looſed *a vinculo* (4). Or, 5. Where either of the parties was under the age of conſent at the time of the firſt marriage, for in ſuch caſe the firſt marriage was voidable by the diſagreement of either party, which the ſecond marriage very clearly amounts to. But if at the age of conſent the parties had agreed to the marriage, which completes the contract, and is indeed the real mar-

(3) But if a perſon marries again under the three firſt exceptions, though the ſecond marriage is not felony, yet as before the ſtatute it is null and void, and the parties will be ſubject to the cenſures and puniſhment of the eccleſiaſtical courts.

By the 35 Geo. III. c. 67. perſons convicted of bigamy are rendered ſubject to the ſame puniſhment, as thoſe are who are convicted of grand or petit larceny. Before this ſtatute they were liable to be burnt in the hand, and impriſoned for any time not exceeding one year; and by the 19 Geo. III. c. 74. the burning in the hand might be changed into a fine, or into public or private whipping, not more than three times. The effect of this ſtatute is, that burning in the hand may be changed into tranſportation for ſeven years, and the impriſonment may be extended to two years.

(4) In the duchess of Kingſton's caſe the judges were unanimouſly of opinion, "That a ſentence in the ſpiritual court againſt "a marriage in a ſuit of jactitation of marriage is not concluſive "evidence, ſo as to ſtop the counſel for the crown from proving "the marriage in an indictment for polygamy. And admitting "ſuch ſentence to be concluſive upon ſuch indictment, the counſel "for the crown may be admitted to avoid the effect of ſuch ſen-"tence, by proving the ſame to have been obtained by fraud or "collusion." 11 *Harg. St. T. R.* 262.

riage;

riage; and afterwards one of them ſhould marry again; I ſhould apprehend that ſuch ſecond marriage would be within the reaſon and penalties of the act.

3. A THIRD ſpecies of felony againſt the good order and oeconomy of the kingdom, is by idle *ſoldiers* and *mariners wandering* about the realm, or perſons pretending ſo to be, [165] and abuſing the name of that honourable profeſſion [k]. Such a one not having a teſtimonial or paſs from a juſtice of the peace, limiting the time of his paſſage; or exceeding the time limited for fourteen days, unleſs he falls ſick; or forging ſuch teſtimonial; is by ſtatute 39 Eliz. c. 17. made guilty of felony without benefit of clergy. This ſanguinary law, though in practice deſervedly antiquated, ſtill remains a diſgrace to our ſtatute-book: yet attended with this mitigation, that the offender may be delivered, if any honeſt freeholder or other perſon of ſubſtance will take him into his ſervice, and he abides in the ſame for one year; unleſs licenſed to depart by his employer, who in ſuch caſe ſhall forfeit ten pounds (5).

4. OUTLANDISH perſons calling themſelves *Egyptians*, or *gypſies*, are another object of the ſeverity of ſome of our unrepealed ſtatutes. Theſe are a ſtrange kind of commonwealth among themſelves of wandering impoſtors and jugglers, who were firſt taken notice of in Germany about the beginning of the fifteenth century, and have ſince ſpread themſelves all over Europe. Munſter [h], who is followed and relied upon by Spelman [i] and the other writers, fixes the time of their firſt appearance to the year 1417; under paſſports, real or pretended,

[k] 5 Inſt. 85. [h] *Coſmogr. l.* 3. [i] *Gloſſ.* 193.

(5) In the vagrant act the 17 Geo. II. c. 5. there is an exception in favour of ſoldiers having certificates from their officers, or the ſecretary at war; and alſo in favour of mariners having a teſtimonial from a juſtice of peace, who were thus licenſed to beg. But by 58 Geo. III. c. 45. ſuch certificates and teſtimonials were very properly declared to be null and void; and that all ſoldiers and mariners, who ſhould wander abroad and beg, ſhould be deemed rogues and vagabonds within the meaning of the vagrant act.

from the emperor Sigiſmund, king of Hungary. And pope Pius II. (who died *A. D.* 1464) mentions them in his hiſtory as thieves and vagabonds, then wandering with their families over Europe, under the name of Zigari; and whom he ſuppoſes to have migrated from the country of the Zigi, which nearly anſwers to the modern Circaſſia. In the compaſs of a few years they gained ſuch a number of idle proſelytes, (who imitated their language and complexion, and betook themſelves to the ſame arts of chiromancy, begging, and pilfering,) that they became troubleſome and even formidable to moſt of the ſtates of Europe. Hence they were expelled from France in the year 1560, and from Spain in 1591 [k]. And the government in England took the alarm much earlier: for in 1530, they are deſcribed by ſtatute 22 Hen. VIII. c. 10. as
[166] "outlandiſh people, calling themſelves Egyptians, uſing no "craft nor feat of merchandize, who have come into this "realm and gone from ſhire to ſhire and place to place in "great company, and uſed great, ſubtil, and crafty means "to deceive the people; bearing them in hand, that they "by palmeſtry could tell men's and women's fortunes; and "ſo many times by craft and ſubtilty have deceived the peo-"ple of their money, and alſo have committed many heinous "felonies and robberies." Wherefore they are directed to avoid the realm, and not to return under pain of impriſonment, and forfeiture, of their goods and chattels: and, upon their trials for any felony which they may have committed, they ſhall not be entitled to a jury *de medietate linguae*. And afterwards, it is enacted by ſtatute 1 & 2 Ph. & M. c. 4. and 5 Eliz. c. 20. that if any ſuch perſons ſhall be imported into this kingdom, the importer ſhall forfeit 40 *l.* And if the Egyptians themſelves remain one month in this kingdom; or if any perſon, being fourteen years old, (whether natural born ſubject or ſtranger,) which hath been ſeen or found in the fellowſhip of ſuch Egyptians, or which hath diſguiſed him or herſelf like them, ſhall remain in the ſame one month, at one or ſeveral times; it is felony without benefit of clergy:

[k] Dufreſne. *Gloſſ.* I. 102.

and

and sir Matthew Hale informs us [1], that at one Suffolk assises no less than thirteen gypsies were executed upon these statutes a few years before the restoration. But, to the honour of our national humanity, there are no instances more modern than this, of carrying these laws into practice (6).

5. To descend next to offences, whose punishment is short of death. *Common nusances* are a species of offences against the public order and oeconomical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires [m]. The nature of *common* nusances, and their distinction from *private* nusances, were explained in the preceding volume [n]: when we considered more particularly the [167] nature of the private sort, as a civil injury to individuals. I shall here only remind the student, that common nusances are such inconvenient or troublesome offences, as annoy the whole community in general, and not merely some particular person; and therefore are indictable only, and not actionable; as it would be unreasonable to multiply suits, by giving every man a separate right of action, for what damnifies him in common only with the rest of his fellow-subjects. Of this nature are, 1. Annoyances in *highways*, *bridges*, and public *rivers*, by rendering the same inconvenient or dangerous to pass: either positively, by actual obstructions; or negatively, by want of reparations. For both of these, the person so obstructing, or such individuals as are bound to repair and cleanse them, or (in default of these last) the parish at large, may be indicted, distreined to repair and amend them, and in some cases fined. And a presentment thereof by a judge of assise, *&c.* or a justice of the peace, shall be in all respects

[1] 1 Hal. P. C. 671. [m] 1 Hawk. P. C. 197. [n] Vol. III. pag. 216.

(6) The severe statute of 5 Eliz. c. 20. is repealed by 23 Geo. III. c. 51. And gypsies are now only punishable under the vagrant act, which declares that "all persons, pretending to be gypsies, or "wandering in the habit or form of Egyptians, shall be deemed "rogues and vagabonds." 17 Geo. II. c. 5.

equivalent

equivalent to an indictment[o]. Where there is an houſe erected, or an incloſure made, upon any part of the king's demeſnes, or of an highway, or common ſtreet, or public water, or ſuch like public things, it is properly called a *purpreſture*[p]. 2. All thoſe kinds of nuſances, (ſuch as offenſive trades and manufactures,) which when injurious to a private man are actionable, are, when detrimental to the public, puniſhable by public proſecution, and ſubject to fine according to the quantity of the miſdemeſnor: and particularly the keeping of hogs in any city or market town is indictable as a public nuſance[q]. 3. All diſorderly *inns* or *ale-houſes*, *bawdy-houſes*, *gaming-houſes*, *ſtage-plays* unlicenced, booths and ſtages for *rope-dancers*, *mountebanks*, and the like, are public nuſances, and may upon indictment be ſuppreſſed and fined[r] (7). Inns, in particular, being intended for the lodging and receipt of travellers, may be indicted, ſuppreſſed, and the inn-keepers fined, if they refuſe to entertain a traveller without a very
[168] ſufficient cauſe: for thus to fruſtrate the end of their inſtitution is held to be diſorderly behaviour[s]. Thus too the hoſpitable laws of Norway puniſh, in the ſevereſt degree, ſuch inn-keepers as refuſe to furniſh accommodations at a juſt and reaſonable price[t]. 4. By ſtatute 10 & 11 W. III. c. 17. all *lotteries* are declared to be public nuſances, and all grants, patents, or licences for the ſame to be contrary to law. But, as ſtate-lotteries have, for many years paſt, been found a ready mode for raiſing the ſupply, an act was made 19 Geo. III. c. 21. to licence and regulate the keepers of ſuch lottery-offices (8). 5. The making and ſelling of *fire-works* and *ſquibs*,

[o] Stat. 7 Geo. III, c. 42.
[p] Co. Litt. 277. from the French *pourpris*, an incloſure.
[q] Salk. 460.
[r] 1 Hawk. P. C. 198. 225.
[s] 1 Hawk. P. C. 225.
[t] Stiernh. *de jure Sueon. l.* 3. *c.* 9.

(7) How ſtage-players are to be licenſed, ſee the 28 Geo. III. c. 30. or the title *Players*, in Burn's Juſtice.

(8) The 19 Geo. III. c. 21. is repealed by the 32 Geo. III. c. 47. which introduces a great variety of regulations reſpecting lottery-office keepers. Among others it enacts, that no one ſhall keep an office for the ſale of tickets in the public lottery, without a licence

or throwing them about in any ſtreet, is, on account of the danger that may enſue to any thatched or timber buildings, declared to be a common nuſance, by ſtatute 9 & 10 W. III. c. 7. and therefore is puniſhable by fine (9). And to this head we may refer (though not declared a common nuſance) the making, keeping, or carriage, of too large a quantity of *gunpowder* at one time, or in one place or vehicle; which is prohibited by ſtatute 12 Geo. III. c. 61. under heavy penalties and forfeiture. 6. *Eaves-droppers*, or ſuch as liſten under walls or windows or the eaves of a houſe, to hearken

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licence from the ſtamp office, under a penalty of 100*l.* And if any perſon ſhall ſell the chance or ſhare of a ticket, for leſs time than the whole time of drawing, or ſhall inſure for or againſt the drawing of any ticket, or ſhall receive any money to return money or goods upon any contingency depending upon the tickets in the lottery, he ſhall forfeit 50*l.* And by the 27 Geo. III. c. 1. perſons guilty of any of the preceding offences, may alſo be proceeded againſt as rogues and vagabonds, under the vagrant act; but if they are convicted as vagabonds, they are diſcharged from the pecuniary penalties. And no perſon ſhall ſell any ſhare leſs than a ſixteenth, or without a ſtamp, under a penalty of 50*l.* But the owner of a whole ticket may inſure his ticket with a licenſed lottery-office keeper, ſo as to indemnify himſelf, and receive its value only. The inſurance muſt be made for the whole remaining time of the drawing of the lottery, and in the manner preſcribed by the act. If any editor of a newſpaper, or other perſon, advertizes any illegal ſcheme of gaming in the lottery, he is ſubject to a penalty of 50*l.* 4 *T. R.* 414. The penalties under theſe ſtatutes muſt be ſued for within ſix months, in the courts at Weſtminſter, and the defendant may be held to bail, to the amount of 500*l.* One half of the penalties is given to the proſecutor, the other half to the king.

(9) And if any perſon ſhall make or ſell any ſquibs, rockets, or fire-works, he ſhall forfeit, upon conviction before a magiſtrate, 5*l.* one half to the informer, and the other half to the poor. And if any perſon ſhall throw or fire them into any houſe, ſtreet, or highway, he ſhall forfeit 20*s.* in like manner. 9 & 10 W. III. c. 7.

after

after diſcourſe, and thereupon to frame ſlanderous and miſchievous tales, are a common nuſance and preſentable at the court-leet[t]: or are indictable at the ſeſſions, and puniſhable by fine and finding ſureties for their good behaviour[u]. 7. Laſtly, a *common ſcold*, *communis rixatrix*, (for our law-latin confines it to the feminine gender,) is a public nuſance to her neighbourhood. For which offence ſhe may be indicted[v]; and, if convicted, ſhall[w] be ſentenced to be placed in a certain engine of correction called the trebucket, caſtigatory, or *cucking* ſtool, which in the Saxon language is ſaid to ſignify the ſcolding ſtool; though now it is frequently corrupted into *ducking* ſtool, becauſe the reſidue of the judgment is, that, when ſhe is ſo placed therein, ſhe ſhall be plunged in the water for her puniſhment[x].

[169] 6. IDLENESS in any perſon whatſoever is alſo a high offence againſt the public oeconomy. In China it is a maxim, that if there be a man who does not work, or a woman that is idle, in the empire, ſomebody muſt ſuffer cold or hunger: the produce of the lands not being more than ſufficient, with culture, to maintain the inhabitants: and therefore, though the idle perſon may ſhift off the want from himſelf, yet it muſt in the end fall ſomewhere. The court alſo of Areopagus at Athens puniſhed idleneſs, and exerted a right of examining every citizen in what manner he ſpent his time; the intention of which was[y], that the Athenians, knowing they were to give an account of their occupations, ſhould follow only ſuch as were laudable, and that there might be no room left for ſuch as lived by unlawful arts. The civil law expelled all ſturdy vagrants from the city[z]: and, in our own law, all idle perſons or vagabonds, whom our antient ſtatutes deſcribe to be "ſuch as wake on the night, and ſleep on the "day, and haunt cuſtomable taverns, and ale-houſes, and "nouts about; and no man wot from whence they come, ne "whether they go;" or ſuch as are more particularly deſcribed

[t] Kitch. of courts. 20.
[u] *Ibid.* 1 Hawk. P. C. 132.
[v] 4 Mod. 213.
[w] 1 Hawk. P. C. 198. 200.
[x] 3 Inſt. 219.
[y] Valer. Maxim. *l.* 2. *c.* 6.
[z] *Nov.* 80. *c.* 5.

by

by ſtatute 17 Geo. II. c. 5. and divided into three claſſes, *idle* and *diſorderly* perſons, *rogues* and *vagabonds*, and *incorrigible rogues*;—all theſe are offenders againſt the good order, and blemiſhes in the government, of any kingdom (10). They

(10) Idle and diſorderly perſons are, 1. Thoſe who threaten to run away, and to leave their families upon the pariſh; 2. Who return from the pariſh to which they are removed as paupers, without a certificate; 3. Who refuſe to work for the uſual wages; 4. Who beg within their own pariſhes; 5. And who neglect to work, or who ſpend their money idly, without making a ſufficient allowance for the ſubſiſtence of their families. Rogues and vagabonds are thus deſcribed: 1. Gatherers of alms, under pretence of loſſes, or for priſons or hoſpitals; 2. Fencers; 3. Bearwards; 4. Players of interludes, not being authoriſed by law; 5. Minſtrels; 6. Jugglers; 7. Gypſies; 8. Fortune-tellers; 9. Deceivers by ſubtil craft; 10. Players and betters at unlawful games; 11. Perſons who run away and leave their families chargeable to the pariſh; 12. Unlicenſed pedlars; 13. Perſons who wander abroad, and lodge in alehouſes, outhouſes, or in the open air, without giving a good account of themſelves; 14. Perſons wandering from home, under pretence of ſeeking harveſt-work, without a certificate from the miniſter and one churchwarden of their pariſh; 15. And all wandering beggars. And by 28 Geo. III. c. 88. all perſons who are apprehended with any picklock or implement, with intent to feloniouſly break and enter any dwelling houſe, or with any offenſive weapon, with intent to feloniouſly aſſault any perſon; or who ſhall be found in, or upon, any dwelling houſe, outhouſe, yard, area, or garden, with intent to ſteal, ſhall be deemed rogues and vagabonds.

Rogues and vagabonds, who eſcape when they are apprehended, or refuſe to go before a juſtice, or to be examined, or who give a falſe account of themſelves, after warning of the conſequences, or who refuſe to be conveyed by a paſs, or who eſcape from the houſe of correction, or who commit, after puniſhment, a ſecond offence, become incorrigible rogues. When a perſon is convicted of being a rogue and vagabond, before a juſtice of peace, the juſtice may order him to be whipt, or impriſoned till the next ſeſſions, or for any leſs time; and if impriſoned till the next ſeſſions, the juſtices may then order a further impriſonment for ſix months; female vagabonds are ſubject to the ſame impriſonment, but in no inſtance are liable to whipping, 32 *Geo. III. c.* 45. And the juſtices,

are therefore all punished, by the ſtatute laſt mentioned; that is to ſay, idle and diſorderly perſons with one month's impriſonment in the houſe of correction; rogues and vagabonds with whipping and impriſonment not exceeding ſix months; and incorrigible rogues with the like diſcipline and confinement, not exceeding two years; the breach and eſcape from which confinement in one of an inferior claſs, ranks him among incorrigible rogues; and in a rogue (before incorrigible) makes him a felon, and liable to be tranſported for ſeven years. Perſons harbouring vagrants are liable to a fine of forty ſhillings, and to pay all expences brought upon the pariſh thereby: in the ſame manner as, by our antient
[170] laws, whoever harboured any ſtranger for more than two nights, was anſwerable to the public for any offence that ſuch his inmate might commit [a].

7. UNDER the head of public oeconomy may alſo be properly ranked all ſumptuary laws againſt *luxury*, and extravagant expences in dreſs, diet, and the like; concerning the general utility of which to a ſtate, there is much controverſy among the political writers. Baron Monteſquieu lays it

[a] *LL. Edw. c.* 27. *Bracton. l.* 3. *tr.* 2. *c.* 10. § 2.

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or the court of quarter ſeſſions, may, if they think proper, order a vagabond, after puniſhment, to be conveyed to his place of ſettlement by a paſs, but no juſtice of peace ſhall order any vagrant to be conveyed by a paſs, who has not been actually whipt, or impriſoned for at leaſt ſeven days, which ſhall be certified in the paſs. 32 *Geo. III. c.* 45. The object of this was to correct an abuſe, which much prevailed, of removing paupers by a paſs, who had committed no act of vagrancy, and who ought to have been removed by an order of removal. For the effects of an order of removal and a vagrant paſs are very different; in the firſt caſe, the pariſh removing, bears all the travelling expences of the paupers; but the expence of conveying vagrants by a paſs, is borne by each county through which they are carried. And no appeal lies againſt a vagrant paſs, ſo that the pariſh to which the vagrant is conveyed, muſt be at the expence of ſending, by an order of removal, the vagrant back again, or to ſuch place as, upon inquiry, may be thought his legal ſettlement. 3 *Burn.* tit. Vagrants, c. x.

down,

down [b], that luxury is neceſſary in monarchies, as in France; but ruinous to democracies, as in Holland. With regard therefore to England, whoſe government is compounded of both ſpecies, it may ſtill be a dubious queſtion how far private luxury is a public evil; and as ſuch cognizable by public laws. And indeed our legiſlators have ſeveral times changed their ſentiments as to this point; for formerly there were a multitude of penal laws exiſting, to reſtrain exceſs in apparel [c]; chiefly made in the reigns of Edward the third, Edward the fourth, and Henry the eighth, againſt piked ſhoes, ſhort doublets, and long coats; all of which were repealed by ſtatute 1 Jac. I. c. 25. But, as to exceſs in diet, there ſtill remains one antient ſtatute unrepealed, 10 Edw. III. ſt. 3. which ordains, that no man ſhall be ſerved, at dinner or ſupper, with more than two courſes; except upon ſome great holidays there ſpecified, in which he may be ſerved with three.

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8. NEXT to that of luxury, naturally follows the offence of *gaming*, which is generally introduced to ſupply or retrieve the expences occaſioned by the former: it being a kind of tacit confeſſion, that the company engaged therein do, in general, exceed the bounds of their reſpective fortunes; and therefore they caſt lots to determine upon whom the ruin ſhall at preſent fall, that the reſt may be ſaved a little longer. But, taken in any light, it is an offence of the moſt alarming nature; tending by neceſſary conſequence to promote public idleneſs, theft and debauchery among thoſe of a lower claſs; and, among perſons of a ſuperior rank, it hath frequently been attended with the ſudden ruin and deſolation of antient and opulent families, an abandoned proſtitution of every principle of honour and virtue, and too often hath ended in ſelf-murder. To reſtrain this pernicious vice, among the inferior ſort of people, the ſtatute 33 Hen. VIII. c. 9. was made; which prohibits to all but gentlemen the games of tennis, tables, cards, dice, bowls, and other unlawful diverſions there ſpecified [d], unleſs in the time of chriſtmas, under

[b] Sp. L. b. 7. c. 2 & 4.
[c] 3 Inſt. 199.
[d] Loggating in the fields, ſlide-thrift or ſhove-groat, cloyſh caytes, half-bowl, and coyting.

pecuniary pains and imprisonment. And the same law, and also the statute 30 Geo. II. c. 24. inflict pecuniary penalties, as well upon the master of any public house wherein servants are permitted to game, as upon the servants themselves who are found to be gaming there. But this is not the principal ground of modern complaint: it is the gaming in high life, that demands the attention of the magistrate; a passion to which every valuable consideration is made a sacrifice, and which we seem to have inherited from our ancestors the antient Germans; whom Tacitus[s] describes to have been bewitched with the spirit of play to a most exorbitant degree. "They addict themselves, says he, to dice (which is wonderful) when sober, and as a serious employment; with "such a mad desire of winning or losing, that, when stript "of every thing else, they will stake at last their liberty
[172] "and their very selves. The loser goes into a voluntary "slavery, and, though younger and stronger than his antagonist, suffers himself to be bound and sold. And this perseverance in so bad a cause they call the point of honour: "*ea est in re prava pervicacia, ipsi fidem vocant.*" One would almost be tempted to think Tacitus was describing a modern Englishman. When men are thus intoxicated with so frantic a spirit, laws will be of little avail: because the same false sense of honour, that prompts a man to sacrifice himself, will deter him from appealing to the magistrate. Yet it is proper that laws should be, and be known publicly, that gentlemen may consider what penalties they wilfully incur, and what a confidence they repose in sharpers; who, if successful in play, are certain to be paid with honour, or, if unsuccessful, have it in their power to be still greater gainers by informing. For by statute 16 Car. II. c. 7. if any person by playing or betting shall lose more than 100 *l.* at one time, he shall not be compellable to pay the same; and the winner shall forfeit treble the value, one moiety to the king, the other to the informer. The statute 9 Ann. c. 14. enacts, that all bonds and other securities, given for money won at play, or money lent at the time to play withal, shall be utterly void; that all

[s] *de mor. Germ. c.* 24.

mortgages

mortgages and incumbrances of lands, made upon the ſame conſideration, ſhall be and enure to the uſe of the heir of the mortgagor: that, if any perſon at any time or ſitting loſes 10*l.* at play, he may ſue the winner, and recover it back by action of debt at law; and in caſe the loſer does not, any other perſon may ſue the winner for treble the ſum ſo loſt (10); and the plaintiff may by bill in equity examine the defendant himſelf upon oath: and that in any of theſe ſuits no privilege of parliament ſhall be allowed. The ſtatute farther enacts, that [173] if any perſon by cheating at play ſhall win any money or valuable thing, or ſhall at any one time or ſitting win more than 10*l.* he may be indicted thereupon, and ſhall forfeit five times the value to any perſon who will ſue for it; and (in caſe of cheating) ſhall be deemed infamous, and ſuffer ſuch corporal puniſhment as in caſe of wilful perjury. By ſeveral ſtatutes of the reign of king George II. [f], all private lotteries by tickets, cards, or dice, (and particularly the games of faro, baſſet, ace of hearts, hazard, paſſage, rolly polly, and all other games with dice, except back-gammon,) are prohibited under a penalty of 200*l.* for him that ſhall erect ſuch lotteries, and 50*l.* a time for the players. Public lotteries, unleſs by authority of parliament, and all manner of ingenious devices, under the denomination of ſales or otherwiſe, which in the end are equivalent to lotteries, were before prohibited by a great variety of ſtatutes [g] under heavy

[f] 12 Geo. II. c. 28. 13 Geo. II. c. 6. § 56. 10 Ann. c. 26. § 109. c. 19. 18 Geo. II. c. 34. 8 Geo. I. c. 2. § 36, 37. 9 Geo. I. c. 19.

[g] 10 & 11 W. III. c. 17. 9 Ann. § 4, 5. 6 Geo. II. c. 35. § 29, 30.

(10) If the loſer does not recover back the money loſt within three months, any other perſon may recover the ſame, and treble the amount beſides, with coſts, one half for himſelf, the other half for the poor. See 1 vol. p. 88. *n.* 20. If money be lent to game with, it may be recovered back as money lent, though the bond, note, or other ſecurity given for it is void. 2 *Burr.* 1077.

A bill in equity may be filed to diſcover the conſideration of a promiſſory note or other ſecurity alleged to be given for money loſt at play, and to have it delivered up. *Andrews* v. *Berry*, 3 *Aſh.* 634.

In an action againſt A, to recover back money loſt, A may plead that it was not won by him alone, but jointly with B. 7 *T. R.* 257.

pecuniary penalties. But particular deſcriptions will ever be lame and deficient, unleſs all games of mere chance are at once prohibited; the inventions of ſharpers being ſwifter than the puniſhment of the law, which only hunts them from one device to another. The ſtatute 13 Geo. II. c. 19. to prevent the multiplicity of horſe races, another fund of gaming, directs that no plates or matches under 50*l.* value ſhall be run, upon penalty of 200*l.* to be paid by the owner of each horſe running, and 100*l.* by ſuch as advertiſe the plate (11). By ſtatute 18 Geo. II. c. 34. the ſtatute 9 Ann. is farther enforced, and ſome deficiencies ſupplied: the forfeit-

(11) Newmarket and Black Hambleton are excepted, where a race may be run for any ſum or ſtake leſs than fifty pounds. But though ſuch horſe races are lawful, yet it has been determined, that they are games within the ſtatute of 9 Ann. c. 14. and that of conſequence wagers above 10*l.* upon a lawful horſe race, are illegal. 2 *Bl. Rep.* 706. A foot race, and a race againſt time, have alſo been held to be games within the ſtatute of gaming. 2 *Wilſ.* 36. So a wager to travel a certain diſtance within a certain time, with a poſtchaiſe and a pair of horſes, has been conſidered of the ſame nature. 6 *T. R.* 499. A wager for leſs than 10*l.* upon an illegal horſe race, is alſo void and illegal. 4 *T. R.* 1. Wagers in general, by the common law, were lawful contracts, and all wagers may ſtill be recovered in a court of juſtice, which are not made upon games, or which are not ſuch as are likely to diſturb the public peace, or to encourage immorality, or ſuch as will probably affect the intereſts, characters, and feelings of perſons not parties to the wager, or ſuch as are contrary to ſound policy, or the general intereſts of the community. See 3 *T. R.* 693. where the legality of wagers is fully diſcuſſed.

Where a perſon had given 100*l.* upon condition of receiving 300*l.* if peace was not concluded with France within a certain time, and he afterwards brought his action to recover the 300*l.*, it was held the wager was void, as being inconſiſtent with general policy, but he was allowed to recover back the 100*l.* which he had paid, under a count for ſo much money had and received by the defendant to his uſe. 7 *T. R.* 535. So alſo, a perſon was permitted to recover back his ſhare of a wager againſt a ſtakeholder upon a boxing match, 5 *T. R.* 405. the court not conſidering the conduct of the plaintiff in theſe inſtances ſo criminal as to deprive him of the benefit of their aſſiſtance.

ures

tires of that act may now be recovered in a court of equity; and, moreover, if any man be convicted upon information or indictment of winning or losing at play, or by betting at any one time 10*l.* or 20*l.* within twenty-four hours, he shall be fined five times the sum for the benefit of the poor of the parish. Thus careful has the legislature been to prevent this destructive vice: which may show that our laws against gaming are not so deficient, as ourselves and our magistrates [174] in putting those laws in execution.

9. LASTLY, there is another offence, constituted by a variety of acts of parliament; which are so numerous and so confused, and the crime itself of so questionable a nature, that I shall not detain the reader with many observations thereupon. And yet it is an offence which the sportsmen of England seem to think of the highest importance; and a matter, perhaps the only one, of general and national concern: associations having been formed all over the kingdom to prevent it's destructive progress. I mean the offence of destroying such beasts and fowls, as are ranked under the denomination of *game*: which, we may remember, was formerly observed [h], (upon the old principles of the forest law,) to be a trespass and offence in all persons alike, who have not authority from the crown to kill game, (which is royal property,) by the grant of either a free warren, or at least a manor of their own. But the laws, called the game laws, have also inflicted additional punishments (chiefly pecuniary) on persons guilty of this general offence, unless they be people of such rank or fortune as is therein particularly specified. All persons therefore, of what property or distinction soever, that kill game out of their own territories, or even upon their own estates, without the king's licence expressed by the grant of a franchise, are guilty of the first original offence, of encroaching on the royal prerogative (12). And those indigent

[h] See Vol. II. pag. 417, &c.

(12) This doctrine, so frequently repeated by the learned commentator, that no person had originally, or has now, a right to kill game upon his own estate, without a licence, or grant from the king, is controverted at large, by the editor, in 2 vol. p. 419. *n.* 10.

perſons who do ſo, without having ſuch rank or fortune as is generally called a qualification, are guilty not only of the original offence, but of the aggravations alſo, created by the ſtatutes for preſerving the game: which aggravations are ſo ſeverely puniſhed, and thoſe puniſhments ſo implacably inflicted, that the offence againſt the king is ſeldom thought of, provided the miſerable delinquent can make his peace with the lord of the manor. This offence, thus aggravated, I have ranked under the preſent head, becauſe the only rational footing, upon which we can conſider it as a crime, is, that in low and indigent perſons it promotes idleneſs, and takes them away from their proper employments and callings:
[175] which is an offence againſt the public police and oeconomy of the commonwealth.

THE ſtatutes for preſerving the game are many and various, and not a little obſcure and intricate; it being remarked [1], that in one ſtatute only, 5 Ann. c. 14. there is falſe grammar in no fewer than ſix places, beſides other miſtakes: the occaſion of which, or what denomination of perſons were probably the penners of theſe ſtatutes, I ſhall not at preſent inquire. It is in general ſufficient to obſerve, that the *qualifications* for killing game, as they are uſually called, or more properly the *exemptions* from the penalties inflicted by the ſtatute law, are, 1. The having a freehold eſtate of 100*l.* *per annum*; there being fifty times the property required to enable a man to kill a partridge, as to vote for a knight of the ſhire: 2. A leaſehold for ninety-nine years of 150*l.* *per annum*: 3. Being the ſon and heir apparent of an eſquire (a very looſe and vague deſcription) or perſon of ſuperior degree (13): 4. Being the owner, or keeper, of a foreſt, park,

[1] Burn's Juſtice, tit. Game, § 3.

(13) It is not neceſſary that it ſhould be a freehold, or a legal eſtate, for copyhold, or an equitable eſtate of inheritance of the clear value of 100*l.* *per annum*, is a qualification. But it is not ſufficient, if the value of the eſtate is reduced below that ſum by the intereſt of a mortgage. *Cald. Caſ.* 230. A life-eſtate, as a church benefice, muſt be of the clear annual value of 150*l.* See 1 vol. p. 60.

chaſe, or warren. For unqualified perſons tranſgreſſing theſe laws, by killing game, keeping engines for that purpoſe, or even having game in their cuſtody, or for perſons (however qualified) that kill game, or have it in poſſeſſion, at unſeaſonable times of the year, or unſeaſonable hours of the day or night, on ſundays or on Chriſtmas day, there are various penalties aſſigned, corporal and pecuniary, by different ſtatutes [k]; on any of which, but only on one at a time, the juſtices may convict in a ſummay way, or (in moſt of them) proſecutions may be carried on at the aſſiſes. And, laſtly, by ſtatute 28 Geo. II. c. 12. no perſon, however qualified to *kill*, may make merchandize of this valuable privilege, by *ſelling* or expoſing to ſale any game, on pain of like forfeiture as if he had no qualification (14).

[k] *Ibid. eod. tit.*

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p. 60. *n.* 9. The eldeſt ſon of an eſquire, or of any perſon of higher degree, is qualified without any eſtate, whilſt his father is living; but the father himſelf, though an eſquire, doctor, knight, or perſon of ſtill higher rank, is not qualified without having the eſtate required by the ſtatute. *Jones* v. *Smart*, 1 *T. R.* 44. But by the 25 Geo. III. c. 50. and 31 Geo. III. c. 21. every perſon, who ſhall go in purſuit of game, without taking out a certificate from the clerk of the peace of the county or diſtrict, within which ſuch perſon reſides, ſhall forfeit 20 *l.* The clerk of the peace ſhall receive for the certificate 3 *l.* 4*s.* and the certificate ſhall be in force from the day of its date till the firſt of July next following. And if any perſon ſhall produce his certificate to any other perſon, who is in purſuit of game, he may demand of him to ſhew his certificate, and if he does not, he may then demand of him his name, and place of abode, which if he refuſes to give, or gives a falſe name or place of reſidence, he ſhall forfeit 50 *l.* Theſe penalties may be recovered by an action with coſts for the ſole uſe of the plaintiff; or by an information before a juſtice of the peace: but in that caſe if the proſecution is commenced within ſix months, one half of the penalty ſhall be given to the proſecutor, and the other half to the king; but if the proſecution is commenced after ſix months after the offence, the whole penalty ſhall go to the king. The juſtice may mitigate the penalty to one moiety, to be paid together with the coſts. And upon nonpayment of the penalty and coſts the party may be impriſoned three months. But upon giving ſecurity for the payment of theſe, he may appeal from the conviction to the next quarter ſeſſions.

(14) But a perſon qualified to kill, is not ſubject to any penalty for buying game.

CHAPTER THE FOURTEENTH.

OF HOMICIDE.

IN the ten preceding chapters we have conſidered, firſt, ſuch crimes and miſdemeſnors as are more immediately injurious to God and his holy religion; ſecondly, ſuch as violate or tranſgreſs the law of nations; thirdly, ſuch as more eſpecially affect the king, the father and repreſentative of his people: fourthly, ſuch as more directly infringe the rights of the public or commonwealth, taken in it's collective capacity; and are now, laſtly, to take into conſideration thoſe which in a more peculiar manner affect and injure *individuals* or private ſubjects.

WERE theſe injuries indeed confined to individuals only, and did they affect none but their immediate objects, they would fall abſolutely under the notion of private wrongs; for which a ſatisfaction would be due only to the party injured: the manner of obtaining which was the ſubject of our inquiries in the preceding volume. But the wrongs, which we are now to treat of, are of a much more extenſive conſequence; 1. Becauſe it is impoſſible they can be committed without a violation of the laws of nature; of the moral as well as political rules of right: 2. Becauſe they include in them almoſt always a breach of the public peace: 3. Becauſe by their example and evil tendency they threaten and endanger the ſubverſion of all civil ſociety. Upon theſe accounts it is, [177] that, beſides the private ſatisfaction due and given in many

caſes to the individual, by action for the private wrong, the government alſo calls upon the offender to ſubmit to public puniſhment for the public crime. And the proſecution of theſe offences is always at the ſuit and in the name of the king, in whom by the texture of our conſtitution the *jus gladii*, or executory power of the law, entirely reſides. Thus too, in the old Gothic conſtitution, there was a threefold puniſhment inflicted on all delinquents: firſt, for the private wrong to the party injured; ſecondly, for the offence againſt the king by diſobedience to the laws; and thirdly, for the crime againſt the public by their evil example [a]. Of which we may trace the groundwork, in what Tacitus tells us of his Germans [b]; that, whenever offenders were fined, "*pars* "*multae regi, vel civitati, pars ipſi qui vindicatur vel propin-*"*quis ejus, exſolvitur.*"

THESE crimes and miſdemeſnors againſt private ſubjects are principally of three kinds; againſt their *perſons*, their *habitations*, and their *property*.

OF crimes injurious to the *perſons* of private ſubjects, the moſt principal and important is the offence of taking away that life, which is the immediate gift of the great Creator; and of which therefore no man can be entitled to deprive himſelf or another, but in ſome manner either expreſsly commanded in, or evidently deducible from, thoſe laws which the Creator has given us; the divine laws, I mean, of either nature or revelation. The ſubject therefore of the preſent chapter will be the offence of *homicide* or deſtroying the life of man, in it's ſeveral ſtages of guilt, ariſing from the particular circumſtances of mitigation or aggravation which attend it.

Now homicide, or the killing of any human creature, is of three kinds; *juſtifiable*, *excuſable*, and *felonious*. The firſt has no ſhare of guilt at all; the ſecond very little; but the

[a] Stiernhook, *l.* 1. *c.* 5. [b] *de mor. Germ. c.* 12.

third is the highest crime against the law of nature that man is capable of committing.

I. JUSTIFIABLE homicide is of divers kinds.

1. SUCH as is owing to some unavoidable *necessity*, without any will, intention, or desire, and without any inadvertence or negligence, in the party killing, and therefore without any shadow of blame. As, for instance, by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who hath forfeited his life by the laws and verdict of his country. This is an act of necessity, and even of civil duty; and therefore not only justifiable, but commendable, where the law requires it. But the law must *require* it, otherwise it is not justifiable: therefore wantonly to kill the greatest of malefactors, a felon or a traitor, attainted or outlawed, deliberately, uncompelled, and extrajudicially, is murder[c]. For as Bracton[d] very justly observes, "*istud homicidium si fit ex livore, vel delectatione* "*effundendi humanum sanguinem, licet juste occidatur iste, tamen* "*occisor peccat mortaliter, propter intentionem corruptam.*" And farther, if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly, the judge is guilty of murder[e]. And upon this account sir Matthew Hale himself, though he accepted the place of a judge of the common pleas under Cromwell's government, (since it is necessary to decide the disputes of civil property in the worst of times,) yet declined to sit on the crown side at the assises, and try prisoners; having very strong objections to the legality of the usurper's commission[f]: a distinction perhaps rather too refined; since the punishment of crimes is at least as necessary to society, as maintaining the boundaries of property. Also such judgment, when legal, must be executed by the proper officer, or his appointed deputy; for no one else is *required* by law to do it, which requisition it is, that justifies the homicide. If another

[c] 1 Hal. P. C. 497.
[d] *fol.* 120.
[e] 1 Hawk. P. C. 70. 1 Hal. P. C. 497.
[f] Burnet in his life.

person

perſon doth it of his own head, it is held to be murder[g]: even though it be the judge himſelf[h]. It muſt farther be executed, *ſervato juris ordine*; it muſt purſue the ſentence of the court. If an officer beheads one who is adjudged to be hanged, or *vice verſa*, it is murder[i]: for he is merely miniſterial, and therefore only juſtified when he acts under the authority and compulſion of the law: but, if a ſheriff changes one kind of death for another, he then acts by his own authority, which extends not to the commiſſion of homicide, and beſides, this licence might occaſion a very groſs abuſe of his power. The king indeed may remit part of a ſentence; as, in the caſe of treaſon, all but the beheading: but this is no change, no introduction of a new puniſhment; and in the caſe of felony, where the judgment is *to be hanged*, the king (it hath been ſaid) cannot legally order even a peer to be beheaded[k]. But this doctrine will be more fully conſidered in a ſubſequent chapter.

AGAIN: in ſome caſes homicide is juſtifiable, rather by the *permiſſion*, than by the abſolute *command*, of the law: either for the *advancement* of public *juſtice*, which without ſuch indemnification would never be carried on with proper vigour; or, in ſuch inſtances where it is committed for the *prevention* of ſome atrocious *crime*, which cannot otherwiſe be avoided.

2. HOMICIDES, committed for the *advancement* of public *juſtice*, are; 1. Where an officer, in the execution of his office, either in a civil or criminal caſe, kills a perſon that aſſaults and reſiſts him[l]. 2. If an officer, or any private perſon, attempts to take a man charged with felony, and is reſiſted; and, in the endeavour to take him, kills him[m]. This is ſimilar to the old Gothic conſtitutions, which

[g] 1 Hal. P. C. 501. 1 Hawk. P. C. 70.
[h] Dalt. Juſt. c. 150.
[i] Finch. L. 91. 3 Inſt. 52. 1 Hal. P. C. 501.
[k] 3 Inſt. 52. 212.
[l] 1 Hal. P. C. 494. 1 Hawk. P. C. 71.
[m] 1 Hal. P. C. 494.

(Stiernhook

(Stiernhook informs us[n]) "*furem, ſi aliter cap i non poſſe*
[180] "*occidere permittunt.*" 3. In caſe of a riot, or rebellious aſſembly, the officers endeavouring to diſperſe the mob are juſtifiable in killing them, both at common law[o], and by the riot act, 1 Geo. I. c. 5. 4. Where the priſoners in a gaol, or going to gaol, aſſault the gaoler or officer, and he in his defence kills any of them, it is juſtifiable, for the ſake of preventing an eſcape[p]. 5. If treſpaſſers in foreſts, parks, chaſes, or warrens, will not ſurrender themſelves to the keepers, they may be ſlain; by virtue of the ſtatute 21 Edw. I. ſt. 2, *de malefactoribus in parcis*, and 3 & 4 W. & M. c. 10. But, in all theſe caſes, there muſt be an apparent neceſſity on the officer's ſide; *viz.* that the party could not be arreſted or apprehended, the riot could not be ſuppreſſed, the priſoners could not be kept in hold, the deer-ſtealers could not but eſcape, unleſs ſuch homicide were committed: otherwiſe, without ſuch abſolute neceſſity, it is not juſtifiable. 6. If the champions in a trial by battle killed either of them the other, ſuch homicide was juſtifiable, and was imputed to the juſt judgment of God, who was thereby preſumed to have decided in favour of the truth[q].

3. IN the next place, ſuch homicide as is committed for the *prevention* of any forcible and atrocious *crime*, is juſtifiable by the law of nature[r]; and alſo by the law of England, as it ſtood ſo early as the time of Bracton[s], and as it is ſince declared by ſtatute 24 Hen. VIII. c. 5. If any perſon attempts a robbery or murder of another, or attempts to break open a houſe *in the night time*, (which extends alſo to an attempt to burn it[t],) and ſhall be killed in ſuch attempt, the ſlayer ſhall be acquitted and diſcharged. This reaches not to any crime unaccompanied with force, as picking of pockets; or to the breaking open of any houſe *in the day time*, unleſs it carries with it an attempt of robbery alſo,

[n] *de jure Goth. l.* 3. *c.* 5.
[o] 1 Hal. P. C. 495. 1 Hawk. P. C. 161.
[p] 1 Hal. P. C. 496.
[q] 1 Hawk. P. C. 71.
[r] Puff. L. of N. l. 2. c. 5.
[s] *fol.* 155.
[t] 1 Hal. P. C. 488.

So

So the Jewiſh law, which puniſhed no theft with death, makes homicide only juſtifiable, in caſe of *nocturnal* houſe-breaking; "if a thief be found breaking up, and he be "ſmitten that he die, no blood ſhall be ſhed for him: but [181] "if the ſun be riſen upon him, there ſhall blood be ſhed for "him; for he ſhould have made full reſtitution[u]." At Athens, if any theft was committed by night, it was lawful to kill the criminal, if taken in the fact[w]: and, by the Roman law of the twelve tables, a thief might be ſlain by night with impunity; or even by day, if he armed himſelf with any dangerous weapon[x]: which amounts very nearly to the ſame as is permitted by our own conſtitutions.

THE Roman law alſo juſtifies homicide, when committed in defence of the chaſtity either of one's ſelf or relations[y]: and ſo alſo, according to Selden[z], ſtood the law in the Jewiſh republic. The Engliſh law likewiſe juſtifies a woman, killing one who attempt to raviſh her[a]: and ſo too the huſband or father may juſtify killing a man, who attempts a rape upon his wife or daughter; but not if he takes them in adultery by conſent, for the one is forcible and felonious, but not the other[b]. And I make no doubt but the forcibly attempting a crime of a ſtill more deteſtable nature, may be equally reſiſted by the death of the unnatural aggreſſor. For the one uniform principle that runs through our own, and all other laws, ſeems to be this; that where a crime, in itſelf capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting. But we muſt not carry this doctrine to the ſame viſionary length that Mr. Locke does; who holds[c], "that all "manner of force without right upon a man's perſon, puts "him in a ſtate of war with the aggreſſor; and, of conſe-"quence, that, being in ſuch a ſtate of war, he may law-

[u] Exod. xxii 2.
[w] Potter Antiq. b. 1. c. 24.
[x] Cic. *pro Milone.* 3. *Ff.* 9 2. 4.
[y] "*Divus Hadrianus reſcripſit, eum "qui ſtuprum ſibi vel ſuis inferentem occi-dit, dimittendum.*" (*Ff.* 48. 8. 1.)
[z] *de legib. Hebræor. l.* 4. *c.* 3
[a] Bac. Elem. 34. 1 Hawk. P. C. 71.
[b] 1 Hal. P. C. 485, 486.
[c] Eſſ. on gov. p. 2. c. 5.

"fully

"fully kill him that puts him under this unnatural reſtraint." However juſt this concluſion may be in a ſtate of uncivilized nature, yet the law of England, like that of every other
[182] well-regulated community, is too tender of the public peace, too careful of the lives of the ſubjects, to adopt ſo contentious a ſyſtem; nor will ſuffer with impunity any crime to be *prevented* by death, unleſs the ſame, if committed, would alſo be *puniſhed* by death.

IN theſe inſtances of *juſtifiable* homicide, it may be obſerved that the ſlayer is in no kind of fault whatſoever, not even in the minuteſt degree; and is therefore to be totally acquitted and diſcharged, with commendation rather than blame. But that is not quite the caſe in *excuſable* homicide, the very name whereof imports ſome fault, ſome error, or omiſſion; ſo trivial however, that the law excuſes it from the guilt of felony, though in ſtrictneſs it judges it deſerving of ſome little degree of puniſhment.

II. EXCUSABLE homicide is of two ſorts; either *per infortunium*, by miſadventure; or *ſe defendendo*, upon a principle of ſelf-preſervation. We will firſt ſee wherein theſe two ſpecies of homicide are diſtinct, and then wherein they agree.

1. HOMICIDE *per infortunium* or *miſadventure*, is where a man, doing a lawful act, without any intention of hurt, unfortunately kills another: as where a man is at work with a hatchet, and the head thereof flies off and kills a ſtander-by; or where a perſon qualified to keep a gun, is ſhooting at a mark, and undeſignedly kills a man[d]: for the act is lawful, and the effect is merely accidental. So where a parent is moderately correcting his child, a maſter his apprentice or ſcholar, or an officer puniſhing a criminal, and happens to occaſion his death, it is only miſadventure; for the act of correction was lawful: but if he exceeds the bounds of moderation, either in the manner, the inſtrument, or the quan-

[d] 1 Hawk. P. C. 73, 74.

tity

tity of punishment, and death ensues, it is manslaughter at least, and in some cases (according to the circumstances) murder[e]; for the act of immoderate correction is unlawful. Thus by an edict of the emperor Constantine[f], when the [183] rigour of the Roman law with regard to slaves began to relax and soften, a master was allowed to chastise his slave with rods and imprisonment, and, if death accidentally ensued, he was guilty of no crime: but if he struck him with a club or a stone, and thereby occasioned his death; or if in any other yet grosser manner "*immoderate suo jure utatur, tunc* "*reus homicidii sit.*"

BUT, to proceed. A tilt or tournament, the martial diversion of our ancestors, was however an unlawful act; and so are boxing and swordplaying, the succeeding amusement of their posterity: and therefore if a knight in the former case, or a gladiator in the latter, be killed, such killing is felony of manslaughter. But, if the king command, or permit such diversion, it is said to be only misadventure; for then the act is lawful[g]. In like manner as, by the laws both of Athens and Rome, he who killed another in the *pancratium*, or public games, authorized or permitted by the state, was not held to be guilty of homicide[h]. Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he has done nothing unlawful: but manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness, of inevitably dangerous consequence[i]. And in general, if death ensues in consequence of an idle, dangerous, and unlawful sport, as shooting or casting stones in a town, or the barbarous diversion of cock-throwing, in these and similar cases, the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts[k].

2. HOMICIDE in *self-defence*, or *se defendendo*, upon a sudden affray, is also excusable rather than justifiable, by the

[e] 1 Hal. P. C. 473, 474.
[f] *Cod. l.* 9. *t.* 14.
[g] 1 Hal. P. C. 473. 1 Hawk. P. C. 74.
[h] Plato. *de LL. lib.* 7. *Ef.* 9. 2. 7.
[i] Hawk. P. C. 73.
[k] *Ibid.* 74. 1 Hal. P. C. 472. Foft. 261.

English

Engliſh law. This ſpecies of ſelf-defence muſt be diſtinguiſhed from that juſt now mentioned, as calculated to hinder the perpetration of a capital crime; which is not only
[184] a matter of excuſe, but of juſtification. But the ſelf-defence, which we are now ſpeaking of, is that whereby a man may protect himſelf from an aſſault, or the like, in the courſe of a ſudden brawl or quarrel, by killing him who aſſaults him. And this is what the law expreſſes by the word *chance-medley*, or (as ſome rather chooſe to write it) *chaud-medley*; the former of which in it's etymology ſignifies a *caſual* affray; the latter an affray in the *heat* of blood or paſſion; both of them of pretty much the ſame import; but the former is in common ſpeech too often erroneouſly applied to any manner of homicide by miſadventure; whereas it appears by the ſtatute 24 Hen. VIII. c. 5. and our antient books [l], that it is properly applied to ſuch killing as happens in ſelf-defence upon a ſudden rencounter [m]. This right of natural defence does not imply a right of attacking: for, inſtead of attacking one another for injuries paſt or impending, men need only have recourſe to the proper tribunals of juſtice. They cannot therefore legally exerciſe this right of preventive defence, but in ſudden and violent caſes when certain and immediate ſuffering would be the conſequence of waiting for the aſſiſtance of the law. Wherefore, to excuſe homicide by the plea of ſelf-defence, it muſt appear that the ſlayer had no other poſſible (or, at leaſt, probable) means of eſcaping from his aſſailant.

It is frequently difficult to diſtinguiſh this ſpecies of homicide (upon *chance-medley* in ſelf-defence) from that of manſlaughter, in the proper, legal ſenſe of the word [n]. But the true criterion between them ſeems to be this: when both parties are actually combating at the time when the mortal ſtroke is given, the ſlayer is then guilty of manſlaughter; but if the ſlayer hath not begun to fight, or (having begun) endeavours to decline any farther ſtruggle, and afterwards,

[l] Staunf. P. C. 16. [n] 3 Inſt. 55.
[m] 3 Inſt. 55. 57. Foſt. 275, 276.

being

being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence [o]. For which reason the law requires, that the person, who kills another in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, [185] before he turns upon his assailant; and that, not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow-subjects the law countenances no such point of honour: because the king and his courts are the *vindices injuriarum*, and will give to the party wronged all the satisfaction he deserves [p]. In this the civil law also agrees with ours, or perhaps goes rather farther; "*qui cum aliter tueri se non possunt, damni culpam* "*dederint, innoxii sunt* [q]." The party assaulted must therefore flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him [r]: for it may be so fierce as not to allow him to yield a step, without manifest danger of his life, or enormous bodily harm; and then in his defence he may kill his assailant instantly. And this is the doctrine of universal justice [s], as well as of the municipal law.

AND, as the *manner* of the defence, so is also the *time* to be considered: for if the person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge, and not defence. Neither, under the colour of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder: for if two persons, A and B, agree to fight a duel, and A gives the first onset, and B retreats as far as he safely can, and then kills A, this is murder; because of the previous malice and concerted design [t]. But if A upon a sudden quarrel assaults B first, and

[o] Fost. 277.
[p] 1 Hal. P. C. 481, 483.
[q] *Ff.* 9. 2. 45.
[r] 1 Hal. P. C. 483.
[s] Puff. b. 2. c. 5. § 13.
[t] 1 Hal. P. C. 479.

upon

upon B's returning the aſſault, A really and *bona fide* flees; and, being driven to the wall, turns again upon B and kills him; this may be *ſe defendendo* according to ſome of our writers[u]: [186] though others[w] have thought this opinion too favourable; inaſmuch as the neceſſity, to which he is at laſt reduced, originally aroſe from his own fault. Under this excuſe, of ſelf-defence, the principal civil and natural relations are comprehended; therefore maſter and ſervant, parent and child, huſband and wife, killing an aſſailant in the neceſſary defence of each other reſpectively, are excuſed; the act of the relation aſſiſting being conſtrued the ſame as the act of the party himſelf[x].

THERE is one ſpecies of homicide *ſe defendendo*, where the party ſlain is equally innocent as he who occaſions his death: and yet this homicide is alſo excuſable from the great univerſal principle of ſelf-preſervation, which prompts every man to ſave his own life preferable to that of another, where one of them muſt inevitably periſh. As, among others, in that caſe mentioned by lord Bacon[y], where two perſons, being ſhipwrecked, and getting on the ſame plank, but finding it not able to ſave them both, one of them thruſts the other from it, whereby he is drowned. He who thus preſerves his own life at the expenſe of another man's, is excuſable through unavoidable neceſſity, and the principle of ſelf-defence; ſince their both remaining on the ſame weak plank is a mutual, though innocent, attempt upon, and an endangering of, each other's life.

LET us next take a view of thoſe circumſtances wherein theſe two ſpecies of homicide, by miſadventure and ſelf-defence, agree; and thoſe are in their blame and puniſhment. For the law ſets ſo high a value upon the life of a man, that it always intends ſome miſbehaviour in the perſon who takes it away, unleſs by the command or expreſs permiſſion of the law. In the caſe of miſadventure, it preſumes negligence, or

[u] 1 Hal. P. C. 482.
[w] 1 Hawk. P. C. 75.
[x] 1 Hal. P. C. 484.
[y] Elem. c. 5. See alſo 1 Hawk. P. C. 73.

at

at leaſt a want of ſufficient caution in him who was ſo unfortunate as to commit it; who therefore is not altogether faultleſs [z]. And as to the neceſſity which excuſes a man who kills another *ſe defendendo*, lord Bacon [a] entitles it *neceſſitas culpabilis*, and thereby diſtinguiſhes it from the former neceſſity of killing a thief or a malefactor. For the law intends that the quarrel or aſſault aroſe from ſome unknown wrong, or ſome provocation, either in word or deed: and ſince in quarrels both parties may be, and uſually are, in ſome fault; and it ſcarce can be tried who was originally in the wrong; the law will not hold the ſurvivor entirely guiltleſs. But it is clear, in the other caſe, that where I kill a thief that breaks into my houſe, the original default can never be upon my ſide. The law beſides may have a farther view, to make the crime of homicide more odious, and to caution men how they venture to kill another upon their own private judgment; by ordaining, that he who ſlays his neighbour, without an expreſs warrant from the law ſo to do, ſhall in no caſe be abſolutely free from guilt. [187]

Nor is the law of England ſingular in this reſpect. Even the ſlaughter of enemies required a ſolemn purgation among the Jews; which implies that the death of a man, however it happens, will leave ſome ſtain behind it. And the moſaical law [b] appointed certain cities of refuge for him "who "killed his neighbour unawares: as if a man goeth into "the wood with his neighbour to hew wood, and his hand "fetcheth a ſtroke with the ax to cut down a tree, and the "head ſlippeth from the helve, and lighteth upon his neigh-"bour that he die, he ſhall flee unto one of theſe cities "and live." But it ſeems he was not held wholly blameleſs, any more than in the Engliſh law; ſince the avenger of blood might ſlay him before he reached his aſylum, or if he afterwards ſtirred out of it till the death of the high prieſt. In the imperial law likewiſe [c] caſual homicide was excuſed, by the

[z] 1 Hawk. P. C. 72.
[a] Elem. c. 5.
[b] Numb. c. 35. and Deut. c. 19.
[c] Cod. 9. 16. 5.

indulgence of the emperor signed with his own sign manual, "*adnotatione principis:*" otherwise the death of a man, however committed, was in some degree punishable. Among the Greeks [d] homicide by misfortune was expiated by voluntary
[188] banishment for a year [e]. In Saxony a fine is paid to the kindred of the slain; which also, among the Western Goths, was little inferior to that of voluntary homicide [f]: and in [g] France no person is ever absolved in cases of this nature, without a largess to the poor, and the charge of certain masses for the soul of the party killed.

THE penalty inflicted by our laws is said by sir Edward Coke to have been anciently no less than death [h]; which however is with reason denied by later and more accurate writers [i]. It seems rather to have consisted in a forfeiture, some say of all the goods and chattels, others only of part of them, by way of fine or *weregild* [k]: which was probably disposed of, as in France, *in pios usus*, according to the humane superstition of the times, for the benefit of *his* soul who was thus suddenly sent to his account, with all his imperfections on his head. But that reason having long ceased, and the penalty (especially if a total forfeiture) growing more severe than was intended, in proportion as personal property has become more considerable, the delinquent has now, and has had as early as our records will reach [l], a pardon and writ of restitution of his goods as a matter of course and right, only paying for suing out the same [m]. And indeed to prevent this expence, in cases where the death has notoriously happened by misadventure or in self-defence, the judges will usually permit (if not direct) a general verdict of acquittal [n] (1).

[d] Plato. *de Leg. lib.* 9.

[e] To this expiation by banishment the spirit of Patroclus in Homer may be thought to allude, when he reminds Achilles, in the twenty-third iliad, that when a child, he was obliged to flee his country for casually killing his playfellow; "ἀνδρὸς ἐξ ἐϑέλων."

[f] Stiernh. *de jure Goth. l.* 3. *c.* 4.

[g] De Morney, on the digest.

[h] 2 Inst. 148. 315.

[i] 1 Hal. P. C. 425. 1 Hawk. P. C. 75. Fost. 282, &c.

[k] Fost. 287.

[l] Fost. 283.

[m] 2 Hawk. P. C. 381.

[n] Fost. 288.

(1) Where the homicide does not amount to murder or manslaughter, it is now the universal practice to direct an acquittal.

III. FELO-

III. FELONIOUS homicide is an act of a very different nature from the former, being the killing of a human creature, of any age or sex, without justification or excuse. This may be done either by killing one's self, or another man.

[189] SELF-MURDER, the pretended heroism, but real cowardice, of the Stoic philosophers, who destroyed themselves to avoid those ills which they had not the fortitude to endure, though the attempting it seems to be countenanced by the civil law [o], yet was punished by the Athenian law with cutting off the hand, which committed the desperate deed [p]. And also the law of England wisely and religiously considers, that no man hath a power to destroy life, but by commission from God, the author of it: and, as the suicide is guilty of a double offence; one spiritual, in evading the prerogative of the Almighty, and rushing into his immediate presence uncalled for; the other temporal, against the king, who hath an interest in the preservation of all his subjects; the law has therefore ranked this among the highest crimes, making it a peculiar species of felony, a felony committed on one's self. And this admits of accessories before the fact, as well as other felonies; for if one persuades another to kill himself, and he does so, the adviser is guilty of murder [q]. A *felo de se* therefore is he that deliberately puts an end to his own existence, or commits any unlawful malicious act, the consequence of which is his own death: as if attempting to kill another, he runs upon his antagonist's sword: or, shooting at another, the gun bursts and kills himself [r]. The party must be of years of discretion, and in his senses, else it is no crime. But this excuse ought not to be strained to that length, to which our coroner's juries are apt to carry it, *viz.* that the very act of suicide is an evidence of insanity; as if every man, who acts contrary to reason, had no reason at all:

[o] "*Si quis impatientia doloris, aut [p] Pott. Antiq. b. 1. c. 26.*
si taedio vitae, aut morbo, aut furore, [q] Keilw. 136.
aut pudore, mori maluit, non animad- [r] 1 Hawk. P. C. 68. 1 Hal. P. C.
vertatur in eum." *Ff.* 49. 16. 6. 413.

for the ſame argument would prove every other criminal *non compos*, as well as the ſelf-murderer. The law very rationally judges, that every melancholy or hypochondriac fit does not deprive a man of the capacity of diſcerning right from wrong; which is neceſſary, as was obſerved in a former chapter[f], to
[190] form a legal excuſe. And therefore if a real lunatic kills himſelf in a lucid interval, he is a *felo de ſe* as much as another man[g].

BUT now the queſtion follows, what puniſhment can human laws inflict on one who has withdrawn himſelf from their reach? They can only act upon what he has left behind him, his reputation and fortune: on the former by an ignominious burial in the highway, with a ſtake driven through his body; on the latter, by a forfeiture of all his goods and chattels to the king: hoping that his care for either his own reputation, or the welfare of his family, would be ſome motive to reſtrain him from ſo deſperate and wicked an act. And it is obſervable, that this forfeiture has relation to the time of the act done in the felon's lifetime, which was the cauſe of his death. As if huſband and wife be poſſeſſed jointly of a term of years in land, and the huſband drowns himſelf; the land ſhall be forfeited to the king, and the wife ſhall not have it by ſurvivorſhip. For by the act of caſting himſelf into the water he forfeits the term; which gives a title to the king, prior to the wife's title by ſurvivorſhip, which could not accrue till the inſtant of her huſband's death[h]. And though it muſt be owned that the letter of the law herein borders a little upon ſeverity, yet it is ſome alleviation that the power of mitigation is left in the breaſt of the ſovereign, who upon this (as on all other occaſions) is reminded by the oath of his office to execute judgment in mercy.

THE other ſpecies of criminal homicide is that of killing another man. But in this there are alſo degrees of guilt, which divide the offence into *manſlaughter* and *murder*. The

[f] See pag. 24. [g] 1 Hal. P. C. 412. [h] Finch. L. 236.

difference

difference between which may be partly collected from what has been incidentally mentioned in the preceding articles, and principally conſiſts in this, that manſlaughter (when voluntary) ariſes from the ſudden heat of the paſſions, murder from the wickedneſs of the heart.

[191]

1. MANSLAUGHTER is therefore thus defined[u], the unlawful killing of another, without malice either expreſs or implied: which may be either voluntarily, upon a ſudden heat; or involuntarily, but in the commiſſion of ſome unlawful act. Theſe were called in the Gothic conſtitutions "*homicidia vulgaria; quae aut caſu, aut etiam ſponte committuntur, ſed in ſubitaneo quodam iracundiae calore et impetu*[w]." And hence it follows, that in manſlaughter there can be no acceſſaries before the fact; becauſe it muſt be done without premeditation.

As to the firſt, or *voluntary* branch: if upon a ſudden quarrel two perſons fight, and one of them kills the other, this is manſlaughter: and ſo it is, if they upon ſuch an occaſion go out and fight in a field; for this is one continued act of paſſion[x]: and the law pays that regard to human frailty, as not to put a haſty and deliberate act upon the ſame footing with regard to guilt. So alſo if a man be greatly provoked, as by pulling his noſe, or other great indignity, and immediately kills the aggreſſor, though this is not excuſable *ſe defendendo*, ſince there is no abſolute neceſſity for doing it to preſerve himſelf; yet neither is it murder, for there is no previous malice; but it is manſlaughter[y]. But in this, and in every other caſe of homicide, upon provocation, if there be a ſufficient cooling-time for paſſion to ſubſide and reaſon to interpoſe, and the perſon ſo provoked afterwards kills the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder[z]. So if a man takes another in the act of adultery with his wife, and kills him directly upon the ſpot; though this was allowed by the laws of

[u] 1 Hal. P. C. 466.
[w] Stiern. *de jure Goth. l.* 3. *c.* 4.
[x] 1 Hawk. P. C. 82.
[y] Kelyng. 135.
[z] Foſt. 296.

Solon [a], as likewise by the Roman civil law, (if the adulterer was found in the husband's own house [b],) and also among the antient Goths [c]; yet in England it is not absolutely ranked in the class of justifiable homicide, as in case of a forcible rape,
[192] but it is manslaughter [d]. It is however the lowest degree of it; and therefore in such a case the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation [e]. Manslaughter therefore on a sudden provocation differs from excusable homicide *se defendendo* in this: that in one case there is an apparent necessity, for self-preservation, to kill the aggressor; in the other no necessity at all, being only a sudden act of revenge.

The second branch, or *involuntary* manslaughter, differs also from homicide excusable by misadventure, in this; that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As if two persons play at sword and buckler, unless by the king's command, and one of them kills the other; this is manslaughter, because the original act was unlawful, but it is not murder, for the one had no intent to do the other any personal mischief [f]. So where a person does an act, lawful in itself, but in an unlawful manner, and without due caution and circumspection: as when a workman flings down a stone or piece of timber into the street, and kills a man; this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done: if it were in a country village, where few passengers are, and he calls out to all people to have a care, it is misadventure only; but if it were in London, or other populous town, where people are continually passing, it is manslaughter, though he gives loud warning [g]; and murder, if he knows of their passing, and gives no warning at all, for then it is malice against all mankind [h]. And, in general, when an involuntary kill-

[a] Plutarch. *in vit. Solon.*
[b] *Ff.* 48. 5. 24.
[c] Stiernh. *de jure Goth. l.* 3. *c.* 2.
[d] 1 Hal. P. C. 486.
[e] Sir T. Raym. 212.
[f] 3 Inst. 56.
[g] Kel. 40.
[h] 3 Inst. 57.

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ing happens in consequence of an unlawful act, it will be either murder or manslaughter[1] according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or in it's consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter *i*. [193]

NEXT, as to the *punishment* of this degree of homicide: the crime of manslaughter amounts to felony, but within the benefit of clergy; and the offender shall be burnt in the hand, and forfeit all his goods and chattels (2).

BUT there is one species of manslaughter, which is punished as murder, the benefit of clergy being taken away from it by statute; namely, the offence of mortally *stabbing* another, though done upon sudden provocation. For by statute 1 Jac. I. c. 8. when one thrusts or stabs another, not then having a weapon drawn, or who hath not then first stricken the party stabbing, so that he dies thereof within six months after, the offender shall not have the benefit of clergy, though he did it not of malice aforethought. This statute was made on account of the frequent quarrels and stabbings with short daggers, between the Scotch and the English, at the accession of James the first *k*; and, being therefore of a temporary nature, ought to have expired with the mischief which it meant to remedy. For, in point of solid and substantial justice, it cannot be said that the mode of killing, whether

[1] Our statute law has severely animadverted on one species of criminal negligence, whereby the death of a man is occasioned. For by statute 20 Geo. II. c. 21. if any waterman between Gravesend and Windsor receives into his boat or barge a greater number of persons than the act allows, and any passenger shall then be drowned, such waterman is guilty (not of manslaughter, but) of felony, and shall be transported, as a felon. 1 Foster. 258. 1 Hawk. P. C. 84. 1 Lord Raym. 280.

(2) By the 19 Geo. III. c. 74. instead of burning in the hand, the court may, if they think fit, impose a moderate pecuniary fine, and this fine shall have the same legal effect and consequences as burning in the hand.

by ſtabbing, ſtrangling, or ſhooting, can either extenuate or enhance the guilt: unleſs where, as in the caſe of poiſoning, it carries with it an internal evidence of cool and deliberate malice. But the benignity of the law hath conſtrued the ſtatute ſo favourably in behalf of the ſubject, and ſo ſtrictly when againſt him, that the offence of ſtabbing now ſtands almoſt upon the ſame footing, as it did at the common law[l]. Thus, (not to repeat the caſes before-mentioned, of ſtabbing an adulteress, &c. which are barely manſlaughter, as at common law,) in the conſtruction of this ſtatute it hath been doubted, whether, if the deceaſed had ſtruck at all before the mortal blow given, this does not take it out of the ſtatute, though in the preceding quarrel the ſtabber had given the firſt blow; and it ſeems to be the better opinion, that this is not within the ſtatute[m]. Alſo it hath been reſolved, that the killing a man
[194] by throwing a hammer or other blunt weapon is not within the ſtatute; and whether a ſhot with a piſtol be ſo or not, is doubted[n]. But if the party ſlain had a cudgel in his hand, or had thrown a pot or a bottle, or diſcharged a piſtol at the party ſtabbing, this is a ſufficient having a weapon drawn on his ſide within the words of the ſtatute[o].

2. WE are next to conſider the crime of deliberate and wilful *murder*; a crime at which human nature ſtarts, and which is I believe puniſhed almoſt univerſally throughout the world with death. The words of the moſaical law (over and above the general precept to Noah[p], that "whoſo ſheddeth "man's blood, by man ſhall his blood be ſhed") are very emphatical in prohibiting the pardon of murderers[q], "Moreover ye ſhall take no ſatisfaction for the life of a murderer, who is guilty of death, but he ſhall ſurely be put to "death: for the land cannot be cleanſed of the blood that "is ſhed therein, but by the blood of him that ſhed it." And therefore our law has provided one courſe of proſecution, (that by appeal, of which hereafter,) wherein the king himſelf

[l] Poſt. 299, 300.
[m] Poſt. 301. 1 Hawk. P. C. 77.
[n] 3 Hal. P. C. 470.
[o] 1 Hawk. P. C. 77.
[p] Gen. ix. 6.
[q] Numb. xxxv. 31.

self is included the power of pardoning murder: so that, were the king of England so inclined, he could not imitate that Polish monarch mentioned by Puffendorf[a]; who thought proper to remit the penalties of murder to all the nobility, in an edict with this arrogant preamble, "*nos, divini juris* "*rigorem moderantes, &c.*" But let us now consider the definition of this great offence.

THE name of *murder* (as a crime) was antiently applied only to the secret killing of another[b]; (which the word *morda*, signifies in the Teutonic language[c];) and it was defined, "*homicidium quod nullo vidente, nullo sciente, clam perpetratur*[d]", for which the vill wherein it was committed, or (if that were too poor) the whole hundred was liable to a heavy amercement; which amercement itself was also denominated *murdrum*[e]. This was an antient usage among the Goths in Sweden and Denmark; who supposed the neighbourhood, unless they produced the murderer, to have perpetrated or at least connived at the murder[f]: and, according to Bracton[g], was introduced into this kingdom by king Canute, to prevent his countrymen the Danes from being privily murdered by the English; and was afterwards continued by William the conqueror, for the like security to his own Normans[h]. And therefore if, upon inquisition had, it appeared that the person found slain was an Englishman, (the presentment whereof was denominated *englescherie*[i],) the country seems to have been excused from this burthen. But, this difference being totally abolished by statute 14 Edw. III. c. 4. we must now (as is observed by Staunforde[k]) define murder in quite and

[195]

[a] L. of N. b. 8. c. 3.
[b] *Diet. de Secret. l.* 1. *c.* 10.
[c] Stiernh. *de jure Sueon. l.* 3. *c.* 3.
[d] The word *murdre* in our old statutes also signified any kind of concealment or killing. So in the statute of Exeter, 14 Edw. I. "*je viens en volentee de fuire* "*ferai estre celé ne murdré*;" which is thus translated in Fleta, *l.* 1. c. 18. § 4. "*Nullam veritatem celabo, nec celari per-* "*mittam nec murdrari.*" And the words "*par murdre le droit*" in the articles of that statute, are rendered in Fleta *ibi.* "*pro justicia inde habenda.*"
[e] Glanv. *l.* 14. *c.* 3.
[f] Bract. *l.* 3. *tr.* 2. *c.* 35. § 7.
[g] Stat. Marlbr. *c.* 26. Fod. 181.
[h] Stiernh. *de* 3. *c.* 4.
[i] *l.* 3. *tr.* 2. *c.* 15.
[k] 1 Hal. P. C. 447.
[l] Bract. *ubi supr.*
[m] P. C. *l.* 1. *c.* 10.

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ther manner, without regarding whether the party ſlain was killed openly or ſecretly, or whether he was of Engliſh or foreign extraction.

MURDER is therefore now thus defined, or rather deſcribed, by ſir Edward Coke[c]; "when a perſon, of ſound "memory and diſcretion, unlawfully killeth any reaſonable "creature in being, and under the king's peace, with malice "aforethought, either expreſs or implied." The beſt way of examining the nature of this crime will be by conſidering the ſeveral branches of this definition.

FIRST, it muſt be committed by *a perſon of ſound memory and diſcretion*; for lunatics or infants, as was formerly obſerved, are incapable of committing any crime: unleſs in ſuch caſes where they ſhew a conſciouſneſs of doing wrong, and of courſe a diſcretion, or diſcernment, between good and evil.

NEXT, it happens when a perſon of ſuch found diſcretion *unlawfully killeth*. The unlawfulneſs ariſes from the killing
[196] without warrant or excuſe; and there muſt alſo be an actual killing to conſtitute murder: for a bare aſſault, with intent to kill, is only a great miſdemeſnor, though formerly it was held to be murder[d]. The killing may be by poiſoning, ſtriking, ſtarving, drowning, and a thouſand other forms of death, by which human nature may be overcome. And if a perſon be indicted for one ſpecies of killing, as by *poiſoning*, he cannot be convicted by evidence of a totally different ſpecies of death, as by *ſhooting* with a piſtol or *ſtarving*. But where they only differ in circumſtance, as if a *wound* be alleged to be given with a ſword, and it proves to have ariſen from a ſtaff, an axe, or a hatchet, this difference is immaterial[e]. Of all ſpecies of deaths, the moſt deteſtable is that of poiſon; becauſe it can of all others be the leaſt prevented either by manhood or forethought[f]. And therefore by the ſtatute 22 Hen. III. c. 9. it was made treaſon, and a more

[c] 3 Inſt. 47.
[d] 1 Hal. P. C. 425.
[e] 3 Inſt. 319. 2 Hal. P. C. 185.
[f] 3 Inſt. 48.

grievous and lingering kind of death was inflicted on it than the common law allowed; namely, boiling to death (3): but this act did not live long, being repealed by 1 Edw. VI. c. 12. There was also, by the antient common law, one species of killing held to be murder, which may be dubious at this day; as there hath not been an instance wherein it has been held to be murder for many ages past [s]: I mean by bearing false witness against another, with an express premeditated design to take away his life, so as the innocent per-

[s] Fost. 132. In the case of Macdaniel and Berry, reported by Sir Michael Foster, though the then attorney general declined to argue this point of law, I have good grounds to believe it was not from any apprehension of his that the point was not maintainable, but from other prudential reasons. Nothing therefore should be concluded from the waiving of that prosecution (4).

(3) This extraordinary punishment seems to have been adopted by the legislature, from the peculiar circumstances of the crime, which gave rise to it; for the preamble of the statute informs us, that John Roose, a cook, had been lately convicted of throwing poison into a large pot of broth, prepared for the bishop of Rochester's family, and for the poor of the parish; and the said John Roose was by a retrospective clause of the same statute ordered to be boiled to death. Lord Coke mentions several instances of persons suffering this horrid punishment. 3 *Inst.* 48. Murder of malice prepense, was made high treason in Ireland, by 10 Hen. VII. c. 21. *Irish Statutes.*

(4) The guilt of him who takes away the life of an innocent man by a false oath, is much more atrocious than that of an assassin, who murders by poison or a dagger. He who destroys by perjury, adds to the privation of life public ignominy, the most excruciating of tortures to an honourable mind, and reduces an innocent family to ruin and infamy; but notwithstanding this is the most horrid of all crimes, yet there is no modern authority to induce us to think that it is murder by the law of England: Lord Coke says expressly "it is not holden for murder at this day." 3 *Inst.* 48. See also *Fost.* 132. Such a distinction in perjury would be more dangerous to society, and more repugnant to principles of sound policy, than in this instance the apparent want of severity in the law. Few honest witnesses would venture to give evidence against a prisoner tried for his life, if thereby they made themselves liable to be prosecuted as murderers.

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son be condemned and executed [h]. The Gothic laws punished in this case, both the judge, the witnesses, and the prosecutor; "*peculiari poena judicem puniunt; peculiari testes, quorum fides judicem seduxit; peculiari denique et maxima auctorem, ut homicidam*[i]." And, among the Romans, the *lex Cornelia, de sicariis*, punished the false witness with death, as being guilty of a species of assassination [k]. And there is no doubt but this is equally murder *in foro conscientiae* as killing with a sword; though the modern law (to avoid the danger [197] of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the peril of their own lives) has not yet punished it as such. If a man however does such an act, of which the probable consequence may be, and eventually is, death; such killing may be murder, although no stroke be struck by himself, and no killing may be primarily intended: as was the case of the unnatural son, who exposed his sick father to the air, against his will, by reason whereof he died [l]; of the harlot, who laid her child under leaves in an orchard, where a kite struck it and killed it [m]; and of the parish-officers, who shifted a child from parish to parish, till it died for want of care and sustenance [n] (5). So too, if a man hath a beast that is used to do mischief; and he, knowing it, *suffers* it to go abroad, and it kills a man; even this is manslaughter in the owner: but if he had purposely *turned it loose*, though barely to frighten people and make what is called sport, it is with us (as in the Jewish law) as much murder, as if he had incited a bear or dog to worry them [o]. If a physician or surgeon gives his patient a potion or plaister to cure him, which contrary to expectation kills him, this

[h] Mirror. c. 2. § 9. Brit. c. 52. Bracton. *l.* 3. *c.* 4.
[i] Stiernh. *de jure Goth. l.* 3. *c.* 3.
[k] *Ff.* 48. 8. 1.
[l] 1 Hawk. P. C. 78.
[m] 1 Hal. P. C. 432.
[n] Palm. 545.
[o] *Ibid.* 431.

(5) Or if a master refuses his apprentice necessary food or sustenance, or treats him with such continued harshness and severity as his death is occasioned thereby, the law will imply malice, and the offence will be murder. *Leach.* 127.

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is neither murder, nor manſlaughter, but miſadventure; and he ſhall not be puniſhed criminally, however liable he might formerly have been to a civil action for neglect or ignorance [p]: but it hath been holden, that if it be not a *regular* phyſician or ſurgeon, who adminiſters the medicine or performs the operation, it is manſlaughter at the leaſt [q]. Yet ſir Matthew Hale very juſtly queſtions the law of this determination [r]. In order alſo to make the killing murder, it is requiſite that the party die within a year and a day after the ſtroke received, or cauſe of death adminiſtered; in the computation of which, the whole day upon which the hurt was done ſhall be reckoned the firſt [s].

FARTHER; the perſon killed muſt be "*a reaſonable creature in being, and under the king's peace,*" at the time of the killing. Therefore to kill an alien, a Jew, or an outlaw, who are all under the king's peace and protection, is as much murder as to kill the moſt regular-born Engliſhman; except he be an alien enemy in time of war [t]. To kill a child in its mother's womb, is now no murder, but a great miſpriſion: but if the child be born alive, and dieth by reaſon of the potion or bruiſes it received in the womb, it ſeems, by the better opinion, to be murder in ſuch as adminiſtered or gave them [u]. But, as there is one caſe where it is difficult to prove the child's being born alive, namely, in the caſe of the murder of baſtard children by the unnatural mother, it is enacted by ſtatute 2 Jac. I. c. 27. that if any woman be delivered of a child which if born alive ſhould by law be a baſtard; and endeavours privately to conceal its death, by burying the child or the like; the mother ſo offending ſhall ſuffer death as in the caſe of murder, unleſs ſhe can prove by one witneſs at leaſt that the child was actually born dead. This law, which favours pretty ſtrongly of ſeverity, in making the concealment of the death almoſt concluſive evidence of the child's being murdered by the mother, is nevertheleſs to be alſo met with in the criminal codes of many other [198]

[p] Mir. c. 4. § 16. See Vol. III pag. 122.
[q] Britt. c. 5. 4 Inſt. 251.
[r] 1 Hal. P. C. 430.
[s] 1 Hawk. P. C. 79.
[t] 3 Inſt. 50. 1 Hal. P. C. 433.
[u] 3 Inſt. 50. 1 Hawk. P. C. 80. but ſee 1 Hal. P. C. 433.

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nations of Europe; as the Danes, the Swedes, and the French [v]: But I apprehend it has of late years been uſual with us in England, upon trials for this offence, to require ſome ſort of preſumptive evidence that the child was born alive, before the other conſtrained preſumption (that the child whoſe death is concealed, was therefore killed by its parent) is admitted to convict the priſoner.

LASTLY, the killing muſt be committed *with malice aforethought*, to make it the crime of murder. This is the grand criterion which now diſtinguiſhes murder from other killing: and this malice prepenſe, *malitia praecogitata*, is not ſo properly ſpite or malevolence to the deceaſed in particular, as any evil deſign in general: the dictate of a wicked, depraved, and malignant heart [w]: *un diſpoſition a faire un male choſe* [x]; and it may be either *expreſs* or *implied* in law. Expreſs
[199] malice is when one, with a ſedate deliberate mind and formed deſign, doth kill another: which formed deſign is evidenced by external circumſtances diſcovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted ſchemes to do him ſome bodily harm [y]. This takes in the caſe of deliberate duelling, where both parties meet avowedly with an intent to murder: thinking it their duty, as gentlemen, and claiming it as their right, to wanton with their own lives and thoſe of their fellow creatures; without any warrant or authority from any power either divine or human, but in direct contradiction to the laws both of God and man; and therefore the law has juſtly fixed the crime and puniſhment of murder, on them, and on their ſeconds alſo [z]. Yet it requires ſuch a degree of paſſive valour, to combat the dread of even undeſerved contempt, ariſing from the falſe notions of honour too generally received in Europe, that the ſtrongeſt prohibitions and penalties of the law will never be entirely effectual to eradicate this unhappy cuſtom; till a method be found out of compelling the original aggreſſor to make ſome other ſatisfaction to the affronted party, which the world ſhall eſteem equally

v See Barrington on the ſtatutes, 425.
w Foſter. 256.
x 2 Roll. Rep. 461.
y 1 Hal. P. C. 451.
z 1 Hawk. P. C. 82.

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reputable, as that which is now given at the hazard of the life and fortune, as well of the perſon inſulted, as of him who hath given the inſult. Alſo, if even upon a ſudden provocation one beats another in a cruel and unuſual manner, ſo that he dies, though he did not intend his death, yet he is guilty of murder by expreſs malice; that is, by an expreſs evil deſign, the genuine ſenſe of *malitia*. As when a park-keeper tied a boy, that was ſtealing wood, to a horſe's tail, and dragged him along the park; when a maſter corrected his ſervant with an iron bar, and a ſchoolmaſter ſtamped on his ſcholar's belly; ſo that each of the ſufferers died; theſe were juſtly held to be murders, becauſe the correction being exceſſive, and ſuch as could not proceed but from a bad heart, it was equivalent to a deliberate act of ſlaughter[a]. Neither ſhall he be guilty of a leſs crime, who kills another in conſequence of ſuch a wilful act, as ſhews him to be an enemy [200] to all mankind in general; as going deliberately, and with an intent to do miſchief[b], upon a horſe uſed to ſtrike, or coolly diſcharging a gun, among a multitude of people[c]. So if a man reſolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is univerſal malice. And, if two or more come together to do an unlawful act againſt the king's peace, of which the probable conſequence might be bloodſhed; as to beat a man, to commit a riot, or to rob a park: and one of them kills a man; it is murder in them all, becauſe of the unlawful act, the *militia praecogitata*, or evil intended beforehand[d].

Also in many caſes where no malice is expreſſed, the law will imply it: as, where a man wilfully poiſons another, in ſuch a deliberate act the law preſumes malice, though no particular enmity can be proved[e]. And if a man kills another ſuddenly, without any, or without a conſiderable provocation, the law implies malice; for no perſon, unleſs of an abandoned heart, would be guilty of ſuch an act, upon a ſlight or no apparent cauſe. No affront, by words or geſ-

[a] 1 Hal. P. C. 454. 473, 474.
[b] Lord Raym. 143.
[c] 1 Hawk. P. C. 74.
[d] 1 Hawk. P. C. 84.
[e] 1 Hal. P. C. 455.

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tures only, is a ſufficient provocation, ſo as to excuſe or extenuate ſuch acts of violence as manifeſtly endanger the life of another [f]. But if the perſon ſo provoked had unfortunately killed the other, by beating him in ſuch a manner as ſhewed only an intent to chaſtiſe and not to kill him, the law ſo far conſiders the provocation of contumelious behaviour, as to adjudge it only manſlaughter, and not murder [g]. In like manner if one killeth an officer of juſtice, either civil or criminal, in the execution of his duty, or any of his aſſiſtants endeavouring to conſerve the peace, or any private perſon endeavouring to ſuppreſs an affray or apprehend a felon, knowing his authority or the intention with which he interpoſes, the law will imply malice, and the killer ſhall be guilty of murder [h]. And if one intends to do another felony,
[201] and undeſignedly kills a man, this is alſo murder [i]. Thus if one ſhoots at A and miſſes *him*, but kills B, this is murder; becauſe of the previous felonious intent, which the law tranſfers from one to the other. The ſame is the caſe where one lays poiſon for A; and B, againſt whom the priſoner had no malicious intent, takes it, and it kills him; this is likewiſe murder [j]. So alſo, if one gives a woman with child a medicine to procure abortion, and it operates ſo violently as to kill the woman, this is murder in the perſon who gave it [k]. It were endleſs to go through all the caſes of homicide, which have been adjudged either expreſsly, or impliedly, malicious: theſe therefore may ſuffice as a ſpecimen; and we may take it for a general rule that all homicide is malicious, and of courſe amounts to murder, unleſs where *juſtified* by the command or permiſſion of the law; *excuſed* on the account of accident or ſelf-preſervation; or *alleviated* into manſlaughter, by being either the involuntary conſequence of ſome act, not ſtrictly lawful, or (if voluntary) occaſioned by ſome ſudden and ſufficiently violent provocation. And all theſe circumſtances of juſtification, excuſe, or alleviation, it is incumbent upon the priſoner to make out, to the ſatisfaction of the court and jury: the latter of whom are to

[f] 1 Hawk. P. C. 82. 1 Hal. P. C. 455, 456.
[g] Foſt. 292.
[h] 1 Hal. P. C. 457. Foſter, 308, &c.
[i] 1 Hal. P. C. 465.
[j] *Ibid.* 466. [k] *Ibid.* 429.

decide

decide whether the circumſtances alleged are proved to have actually exiſted; the former, how far they extend to take away or mitigate the guilt. For all homicide is preſumed to be malicious, until the contrary appeareth upon evidence [l].

THE puniſhment of murder, and that of manſlaughter, were formerly one and the ſame; both having the benefit of clergy: ſo that none but unlearned perſons, who leaſt knew the guilt of it, were put to death for this enormous crime [m]. But now, by ſeveral ſtatutes [n], the benefit of clergy is taken away from murderers through malice prepenſe, their abettors, procurers, and counſellors. In atrocious caſes, it was frequently uſual for the court to direct the murderer, after execution, to be hung upon a gibbet in chains near the place where the fact was committed: but this was no part of the [202] legal judgment; and the like is ſtill ſometimes practiſed in the caſe of notorious thieves. This, being quite contrary to the expreſs command of the moſaical law [o], ſeems to have been borrowed from the civil law; which, beſides the terror of the example, gives alſo another reaſon for this practice, *viz.* that it is a comfortable ſight to the relations and friends of the deceaſed [p]. But now in England, it is enacted by ſtatute 25 Geo. II. c. 37. that the judge, before whom any perſon is found guilty of wilful murder, ſhall pronounce ſentence immediately after conviction, unleſs he ſees cauſe to poſtpone it; and ſhall in paſſing ſentence direct him to be executed on the next day but one, (unleſs the ſame ſhall be ſunday, and then on the monday following,) and that his body be delivered to the ſurgeons to be diſſected and anatomized [q]: and that the judge may direct his body to be afterwards hung in chains (6); but in no wiſe to be buried without diſſection. And,

[l] Foſt. 255.

[m] 1 Hal. P. C. 450.

[n] 23 Hen. VIII. c. 1. 1 Edw. VI. c. 12. 4 & 5 Ph. & M. c. 4.

[o] "The body of a malefactor ſhall "not remain all night upon the tree; "but thou ſhalt in any wiſe bury him "that day, that the land be not de- "filed." Deut. xxi. 23.

[p] "*Famoſos latrones, in his locis, ubi* "*graſſati ſunt, furca figendos placuit*; "*ut, et conſpectu deterreantur alii, et ſo-* "*latio ſit cognatis interemptorum, eadem* "*loca poena reddita, in quo latrones homi-* "*cidia feciſſent.*" *Ff.* 48. 19. 28. § 15.

[q] Foſt. 107.

(6) The judge, if he thinks it adviſable, may afterwards direct the hanging in chains, by a ſpecial order to the ſheriff; but it does not form any part of the judgment. *Foſt.* 107.

during the ſhort but awful interval between ſentence and execution, the priſoner ſhall be kept alone, and ſuſtained with only bread and water. But a power is allowed to the judge, upon good and ſufficient cauſe to reſpite the execution, and relax the other reſtraints of this act.

BY the Roman law, *parricide*, or the murder of one's parents or children, was puniſhed in a much ſeverer manner than any other kind of homicide. After being ſcourged, the delinquents were ſewed up in a leathern ſack, with a live dog, a cock, a viper, and an ape, and ſo caſt into the ſea [r]. Solon, it is true, in his laws, made none againſt parricide; apprehending it impoſſible that any one ſhould be guilty of ſo unnatural a barbarity [s]. And the Perſians, according to Herodotus, entertained the ſame notion, when they adjudged all perſons who killed their reputed parents to be baſtards. And, upon ſome ſuch reaſon as this, we muſt account for
[203] the omiſſion of an exemplary puniſhment for this crime in our Engliſh laws; which treat it no otherwiſe than as ſimple murder, unleſs the child was alſo the ſervant of his parent [t].

FOR, though the breach of natural relation is unobſerved, yet the breach of civil or eccleſiaſtical connexions, when coupled with murder, denominates it a new offence, no leſs than a ſpecies of treaſon, called *parva proditio*, or *petit treaſon*: which however is nothing elſe but an aggravated degree of murder [t]; although, on account of the violation of private allegiance, it is ſtigmatized as an inferior ſpecies of treaſon [u]. And thus, in the antient Gothic conſtitution, we find the breach both of natural and civil relations ranked in the ſame claſs with crimes againſt the ſtate and the ſovereign [w].

PETIT treaſon, according to the ſtatute 25 Edw. III. c. 2. may happen three ways: by a ſervant killing his maſter, a

[r] *Ff.* 48. 9. 9.
[s] Cic. *pro S. Roſcio.* §. 25.
[t] 1 Hal. P. C. 380.
[t] Foſter. 107. 324. 336.
[u] See pag. 75.
[w] "*Omnium graviſſima cenſetur vis* "*facta ab incolis in patriam, ſubditis in* "*regem, liberis in parentes, maritis in* "*uxores, (et vice verſa,) ſervis in dominos,* "*aut etiam ab homine in ſemet ipſum.*" Stiernh. *de jure Goth. l.* 3. *c.* 3.

wife

wife her husband, or an ecclesiastical person (either secular or regular) his superior, to whom he owes faith and obedience. A servant who kills his master whom he has left, upon a grudge conceived against him during his service, is guilty of petit treason: for the traiterous intention was hatched while the relation subsisted between them; and this is only an execution of that intention [x]. So if a wife be divorced *a mensa et thoro*, still the *vinculum matrimonii* subsists; and if she kills such divorced husband, she is a traitress [y]. And a clergyman is understood to owe canonical obedience to the bishop who ordained him, to him in whose diocese he is beneficed, and also to the metropolitan of such suffragan or diocesan bishop: and therefore to kill any of these is petit treason [z]. As to the rest, whatever has been said, or remains to be observed hereafter, with respect to wilful murder, is also applicable to the crime of petit treason, which is no other than murder in its most odious degree: except that the trial shall be as in [204] cases of high treason, before the improvements therein made by the statutes of William III. [a] But a person indicted of petit treason may be acquitted thereof, and found guilty of manslaughter or murder [b]: and in such case it should seem that *two* witnesses are not necessary, as in case of petit treason they are (7). Which crime is also distinguished from murder in its punishment.

THE punishment of petit treason, in a man, is to be drawn and hanged, and in a woman, to be drawn and burnt [c]: the idea of which latter punishment seems to have been handed down to us by the laws of the antient Druids, which condemned a woman to be burnt for murdering her husband [d];

[x] 1 Hawk. P. C. 89. 1 Hal. P. C. 380.
[y] 1 Hal. P. C. 381.
[z] *Ibid.*
[a] Foft. 337.
[b] Foster. 106. 1 Hal. P. C. 378. 2 Hal. P. C. 184.
[c] 1 Hal. P. C. 382. 3 Inft. 211.
[d] Cæsar *de bell. Gall. l.* 6. *c.* 18.

(7) It has been determined, that a person indicted for petit treason, may upon the evidence of one witness be convicted of murder, though acquitted of the petit treason. *Radbourne's case, Leach*, 363.

and it is now the uſual puniſhment for all ſorts of treaſons committed by thoſe of the famale ſex [a] (8). Perſons guilty of petit treaſon were firſt debarred the benefit of clergy, by ſtatute 12 Hen. VII. c. 7. which has been ſince extended to their aiders, abettors, and counſellors, by ſtatutes 23 Hen. VIII. c. 1. and 4 & 5 P. & M. c. 4.

[a] See pag. 93.

(8) By the 30 Geo. III. c. 48. women ſhall no longer be ſentenced to be burnt; but in all caſes of high and petit treaſon they ſhall be condemned to be drawn and hanged; and in petit treaſon they ſhall be ſubject beſides to the ſame judgment with regard to diſſection and the time of execution as is directed by the 25 Geo. II. c. 37, in caſes of murder. Soon after the paſſing of the 25 Geo. II. c. 37. the majority of the judges agreed, that in the caſe of men convicted of petit treaſon, the judgment introduced by that ſtatute ſhould be added to the common law judgment for petit treaſon. *Poſt.* 107.

CHAPTER THE FIFTEENTH.

OF OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.

HAVING in the preceding chapter considered the principal crime, or public wrong, that can be committed against a private subject, namely, by destroying his life; I proceed now to inquire into such other crimes and misdemesnors, as more peculiar affect the security of his person, while living.

Of these some are felonious, and in their nature capital: others are simple misdemesnors, and punishable with a lighter animadversion. Of the felonies the first is that of *mayhem*.

I. MAYHEM, *mayhemium*, was in part considered in the preceding volume [a], as a civil injury: but it is also looked upon in a criminal light by the law; being an atrocious breach of the king's peace, and an offence tending to deprive him of the aid and assistance of his subjects. For mayhem is properly defined to be, as we may remember, the violently depriving another of the use of such of his members as may render him the less able in fighting, either to defend himself, or to annoy his adversary [b]. And therefore the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts the loss of which in all animals abates their courage, are held to

[a] See Vol. III. pag. 121. [b] Brit. l. 1. c. 25. 1 Hawk. P. C. 111.

be mayhems. But the cutting off his ear, or nose, or the like, are not held to be mayhems at common law; because they do not weaken but only disfigure him.

By the antient law of England he that maimed any man, whereby he lost any part of his body, was sentenced to lose the like part; *membrum pro membro* [c]: which is still the law in Sweden [d]. But this went afterwards out of use: partly because the law of retaliation, as was formerly shewn [e], is at best an inadequate rule of punishment; and partly because upon a repetition of the offence the punishment could not be repeated. So that, by the common law, as it for a long time stood, mayhem was only punishable with fine and imprisonment [f]; unless perhaps the offence of mayhem by castration, which all our old writers held to be felony; "*et sequi-*" *tur aliquando poena capitalis, aliquando perpetuum exilium,* "*cum omnium bonorum ademptione* [g]." And this, although the mayhem was committed upon the highest provocation [h].

But subsequent statutes have put the crime and punishment of mayhem more out of doubt. For first, by statute 5 Hen. IV. c. 5. to remedy a mischief that then prevailed, of beating, wounding, or robbing a man, and then cutting out his *tongue*, or putting ut his *eyes*, to prevent him from being an evidence against them, this offence is declared to be felony, if done of malice prepense; that is, as sir Edward Coke [i] explains it, voluntarily, and of set purpose, though done upon a sudden occasion. Next, in order of time, is the statute 37 Hen. VIII. c. 6. which directs, that if a man shall maliciously and unlawfully cut off the *ear* of any of the

[c] 3 Inst. 118.—*Mes, si la pleynte soit faite de femme qu' avera tolle a home ses membres, en tiel case perdra le feme la une moyn par jugement, come le membre dount ele avera trespasse.* (Brit. c. 25.)

[d] Stiernhook *de jure Sueon. l.* 3. *c.* 3.

[e] See pag. 12.

[f] 1 Hawk. P. C. 112.

[g] Bract. *fol.* 144.

[h] Sir Edward Coke (3 Inst. 62.) has transcribed a record of Henry the third's time, (*Claus.* 13 *Hen. III* m. 9.) by which a gentleman of Somersetshire and his wife appear to have been apprehended and committed to prison, being indicted for dealing thus with John the monk, who was caught in adultery with the wife.

[i] 3 Inst. 62.

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king's subjects, he shall not only forfeit treble damages to the party grieved, to be recovered by action of trespass at [207] common law, as a civil satisfaction; but also 10*l.* by way of fine to the king, which was his criminal amercement. The last statute, but by far the most severe and effectual of all, is that of 22 & 23 Car. II. c. 1. called the Coventry act; being occasioned by an assault on sir John Coventry in the street, and slitting his nose, in revenge (as was supposed) for some obnoxious words uttered by him in parliament. By this statute it is enacted, that if any person shall of malice aforethought, and by lying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any other person, *with intent to maim or to disfigure him*; such person, his counsellors, aiders, and abettors, shall be guilty of felony without benefit of clergy [k] (1).

[k] On this statute Mr. Coke, a gentleman of Suffolk, and one Woodburn, a labourer, were indicted in 1722; Coke for hiring and abetting Woodburn, and Woodburn for the actual fact of slitting the nose of Mr. Crispe, Coke's brother-in-law. The case was somewhat singular. The murder of Crispe was intended, and he was left for dead, being terribly hacked, and disfigured with a hedge-bill; but he recovered. Now the bare intent to murder is no felony; but to disfigure with an intent to disfigure, is made so by this statute; on which they were therefore indicted. And Coke, who was a disgrace to the profession of the law, had the effrontery to rest his defence upon this point, that the assault was not committed with an intent to disfigure, but with an intent to murder; and therefore not within the statute. But the court held, that if a man attacks another to murder him with such an instrument as a hedge-bill, which cannot but endanger the disfiguring him; and in such attack happens not to kill, but only to disfigure him; he may be indicted on this statute; and it shall be left to the jury whether it were not a design to murder by disfiguring, and consequently a malicious intent to disfigure as well as to murder. Accordingly the jury found them guilty of such previous intent to disfigure, in order to effect their principal intent to murder, and they were both condemned and executed. (State Trials. VI. 212.)

(1) In a case where a gentleman had apprehended a pick-pocket, an accomplice followed and gave the gentleman a wound across the nose with a knife; this was held to be a *slitting of the nose* and a maiming within the statute. *Carrol's case, Leach*, 83. It has been determined, that if a man deliberately watches an opportunity and carries his intention into execution, he may be said to lie in wait; but where a person went up to a man stealing turnips, who imme-

THUS much for the felony of mayhem: to which may be added the offence of wilfully and maliciously shooting at any person, in any dwelling-house or other place; an offence, of which the probable consequence may be either killing or maiming him. This, though no such evil consequence ensues, is made felony without benefit of clergy by statute 9 Geo. I. c. 22. and thereupon one Arnold was convicted in 1723 for shooting at lord Onslow; but, being half-a-madman, was never executed, but confined in prison, where he died about thirty years after (2).

[208]

II. THE second offence, more immediately affecting the personal security of individuals, relates to the female part of his majesty's subjects; being that of their *forcible abduction* and *marriage*; which is vulgarly called *stealing an heiress*. For by statute 3 Hen. VII. c. 2. it is enacted, that if any person shall for lucre take any woman, being maid, widow, or wife, and having substance either in goods or lands, or being heir apparent to her ancestors, contrary to her will; and afterwards she be married to such misdoer, or by his consent to another, or defiled; such person, his procurers and abettors,

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diately cut him in the face, this was thought not to be lying in wait within the statute. *Tickner's case*, *Ib.* 170. A wound or incision in the throat has been held not to be a maiming. *Lee's case*, *Ib.* 49.

(2) The essence of this crime consists in *maliciously* shooting; no act of shooting therefore will amount, under this statute, to a capital offence, unless it be accompanied with such circumstances as in construction of law would have amounted to the crime of murder, if death had ensued from such an act; for there is no species of homicide in which malice forms any ingredient except that of murder; it follows therefore that a shooting in the transport of passion, excited by such a degree of provocation, as will reduce the homicide to the offence of manslaughter, is not within the meaning of the statute. *Gastineaux's case*, *Leach*, 323.

Three persons were indicted on the Black Act for shooting at the prosecutor; they were all charged with the single act; and the indictment was held by all the judges of England to be sufficient. Mr. *J. Buller*, 3 *T. R.* 105.

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and ſuch as knowingly receive ſuch woman, ſhall be deemed principal felons; and by ſtatute 39 Eliz. c. 9. the benefit of clergy is taken away from all ſuch felons, who ſhall be principals, procurers, or acceſſories *before* the fact.

In the conſtruction of this ſtatute it hath been determined, 1. That the indictment muſt allege that the taking was for lucre, for ſuch are the words of the ſtatute[l]. 2. In order to ſhew this, it muſt appear that the woman has ſubſtance either real or perſonal, or is an heir apparent[m]. 3. It muſt appear that ſhe was taken away againſt her will. 4. It muſt alſo appear, that ſhe was afterwards married, or defiled. And though poſſibly the marriage or defilement might be by her ſubſequent conſent, being won thereunto by flatteries after the taking, yet this is felony, if the firſt taking were againſt her will[n]: and ſo *vice verſa*, if the woman be originally taken away with her own conſent, yet if ſhe afterwards refuſe to continue with the offender, and be forced againſt her will, ſhe may, from that time, as properly be ſaid to be taken againſt her will, as if ſhe never had given [209] any conſent at all; for, till the force was put upon her, ſhe was in her own power[o]. It is held that a woman, thus taken away and married, may be ſworn and give evidence againſt the offender, though he is her huſband *de facto*; contrary to the general rule of law; becauſe he is no huſband *de jure*, in caſe the actual marriage was alſo againſt her will[p]. In caſes indeed where the actual marriage is good, by the conſent of the inveigled woman obtained after her forcible abduction, ſir Matthew Hale ſeems to queſtion how far her evidence ſhould be allowed: but other authorities[q] ſeem to agree, that it ſhould even then be admitted; eſteeming it abſurd, that the offender ſhould thus take advantage of his own wrong, and that the very act of marriage, which is a principal ingredient of his crime, ſhould (by a forced conſtruction of law)

[l] 1 Hawk. P. C. 110.
[m] 1 Hal. P. C. 660. 1 Hawk. P. C. 109.
[n] 1 Hal. P. C. 660.
[o] 1 Hawk. P. C. 110.
[p] 1 Hal. P. C. 661.
[q] 4 Grn. Car. 488. 3 Keb. 193. State Trials. V. 455.

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be made uſe of to ſtop the mouth of the moſt material witneſs againſt him.

AN inferior degree of the ſame kind of offence, but not attended with force, is puniſhed by the ſtatute 4 & 5 Ph. & Mar. c. 8. which enacts, that if any perſon, above the age of fourteen, unlawfully ſhall convey or *take away any woman child unmarried*, (which is held [r] to extend to baſtards as well as to legitimate children,) within the age of ſixteen years, from the poſſeſſion and againſt the will of the father, mother, guardians, or governors, he ſhall be impriſoned two years, or fined at the diſcretion of the juſtices: and if he deflowers ſuch maid or woman child, or without the conſent of parents contracts matrimony with her, *he* ſhall be impriſoned five years, or fined at the diſcretion of the juſtices, and *ſhe* ſhall forfeit all her lands to her next of kin, during the life of her ſaid huſband (3). So that as theſe ſtolen marriages, under the age of ſixteen, were uſually upon mercenary views, this act, beſides puniſhing the ſeducer, wiſely removed the temptation. But this latter part of the act is now rendered
[210] almoſt uſeleſs, by proviſions of a very different kind, which make the marriage totally void [s], in the ſtatute 26 Geo. II. c. 33.

III. A THIRD offence, againſt the female part alſo of his majeſty's ſubjects, but attended with greater aggravations than that of forcible marriage, is the crime of *rape*, *raptus mulierum*, or the carnal knowlege of a woman forcibly and againſt her will. This, by the Jewiſh law [t], was puniſhed

[r] Stra. 1162. [s] See Vol. I. p. 437, &c. [t] Deut. xxii. 25.

(3) It has been decided in the court of exchequer, that ſhe forfeits her lands only during the life of her huſband. *Amb.* 73. Though the more natural conſtruction of the ſtatute ſeems to be, that the next heir ſhall retain them during the life of the wife, even after the death of the huſband. 1 *Brown.* 23.

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with death, in caſe the damſel was betrothed to another man; and in caſe ſhe was not betrothed, then a heavy fine of fifty ſhekels was to be paid to the damſel's father, and ſhe was to be the wife of the raviſher all the days of his life; without that power of divorce, which was in general permitted by the moſaic law.

THE civil law[a] puniſhes the crime of raviſhment with death and confiſcation of goods: under which it includes both the offence of forcible abduction, or taking away a woman from her friends, of which we laſt ſpoke: and alſo the preſent offence of forcibly diſhonouring them; either of which, without the other, is in that law ſufficient to conſtitute a capital crime. Alſo the ſtealing away a woman from her parents or guardians, and debauching her, is equally penal by the emperor's edict, whether ſhe conſent or is forced: "*ſive volentibus, ſive nolentibus mulieribus, tale facinus fuerit* "*perpetratum.*" And this, in order to take away from women every opportunity of offending in this way; whom the Roman law ſuppoſes never to go aſtray, without the ſeduction and arts of the other ſex: and therefore by reſtraining and making ſo highly penal the ſolicitations of the men, they meant to ſecure effectually the honour of the women. "*Si* "*enim ipſi raptores metu, vel atrocitate poenae, ab hujuſmodi* "*facinore ſe temperaverint, nulli mulieri, ſive volenti, ſive nolenti,* "*peccandi locus relinquetur; quia hoc ipſum* velle *mulierum, ab* "*inſidiis nequiſſimi hominis, qui meditatur rapinam, inducitur.* "*Niſi etenim eam ſolicitaverit, niſi odioſis artibus circumvenerit,* [211] "*non faciet eam velle in tantum dedecus ſeſe prodere.*" But our Engliſh law does not entertain quite ſuch ſublime ideas of the honour of either ſex, as to lay the blame of a mutual fault upon one of the tranſgreſſors only: and therefore makes it a neceſſary ingredient in the crime of rape, that it muſt be againſt the woman's will.

RAPE was puniſhed by the Saxon laws, particularly thoſe of king Athelſtan[b], with death: which was alſo agreeable

[a] *Cod* 9. *tit.* 13. [b] Bracton. *l.* 3. *c.* 28.

to the old Gothic or Scandinavian conſtitution [x]. But this was afterwards thought too hard: and in its ſtead another ſevere, but not capital, puniſhment, was inflicted by William the conqueror; *viz.* caſtration, and loſs of eyes [y]; which continued till after Bracton wrote, in the reign of Henry the third. But in order to prevent malicious accuſations, it was then the law, (and, it ſeems, ſtill continues to be ſo in appeals of rape [z],) that the woman ſhould immediately after, "*dum recens fuerit maleficium,*" go to the next town, and there make diſcovery to ſome credible perſons of the injury ſhe has ſuffered: and afterwards ſhould acquaint the high conſtable of the hundred, the coroners, and the ſheriff with the outrage [a]. This ſeems to correſpond in ſome degree with the laws of Scotland and Arragon [b], which require that complaint muſt be made within twenty-four hours: though afterwards by ſtatute Weſtm. 1. c. 13. the time of limitation in England was extended to forty days. At preſent there is no time of limitation fixed: for, as it is uſually now puniſhed by indictment at the ſuit of the king, the maxim of law takes place, that *nullum tempus occurrit regi:* but the jury will rarely give credit to a ſtale complaint. During the former period alſo it was held for law [c], that the woman (by conſent of the judge and her parents) might redeem the offender from the execution of his ſentence, by accepting him for her huſband; if he alſo was willing to agree to the exchange, but not otherwiſe.

[212] In the 3 Edw. I. by the ſtatute Weſtm. 1. c. 13. the puniſhment of rape was much mitigated: the offence itſelf, of raviſhing a damſel within age, (that is, *twelve* years old,) either with her conſent or without, or of any other woman againſt her will, being reduced to a treſpaſs, if not proſecuted by appeal within forty days, and ſubjecting the offender only to two years impriſonment, and a fine at the king's will.

[x] Stiern. *de jure Sueon. l.* 3. *c.* 2.
[y] *LL. Guil. Conqu. c.* 19.
[z] 1 Hal. P. C. 632.
[a] Glanv. *l.* 14. *c.* 6. Bract. *l.* 3. *c.* 28.
[b] Barrington, 142.
[c] Glanv. *l.* 14. *c.* 6. Bract. *l.* 3. *c.* 28.

But

But this lenity being productive of the moſt terrible conſequences, it was in ten years afterwards, 13 Edw. I. found neceſſary to make the offence of forcible rape felony by ſtatute Weſtm. 2. c. 34. And by ſtatute 18 Eliz. c. 7. it is made felony without benefit of clergy: as is alſo the abominable wickedneſs of carnally knowing and abuſing any woman child under the age of ten years; in which caſe the conſent or non-conſent is immaterial, as by reaſon of her tender years ſhe is incapable of judgment and diſcretion. Sir Matthew Hale is indeed of opinion, that ſuch profligate actions committed on an infant under the age of *twelve* years, the age of female diſcretion by the common law, either with or without conſent, amount to rape and felony; as well ſince as before the ſtatute of queen Elizabeth [d]: but that law has in general been held only to extend to infants under *ten*; though it ſhould ſeem that damſels between *ten* and *twelve* are ſtill under the protection of the ſtatute Weſtm. 1. the law with reſpect to their ſeduction not having been altered by either of the ſubſequent ſtatutes.

A MALE infant, under the age of fourteen years, is preſumed by law incapable to commit a rape, and therefore it ſeems cannot be found guilty of it. For though in other felonies *malitia ſupplet aetatem*, as has in ſome caſes been ſhewn; yet, as to this particular ſpecies of felony, the law ſuppoſes an imbecillity of body as well as mind [e].

THE civil law ſeems to ſuppoſe a proſtitute or common harlot incapable of any injuries of this kind [f]: not allowing any puniſhment for violating the chaſtity of her, who hath [213] indeed no chaſtity at all, or at leaſt hath no regard to it. But the law of England does not judge ſo hardly of offenders, as to cut off all opportunity of retreat even from common ſtrumpets, and to treat them as never capable of amendment. It therefore holds it to be felony to force even a concubine or harlot; becauſe the woman may have forſaken that unlawful

[d] 1 Hal. P. C. 631. [e] *Ibid.* [f] *Cod.* 9. 9. 22. *Ff.* 47. 2. 39.

courſe of life [g]: for, as Bracton well obſerves [h], "*licet me-*
"*retrix fuerit antea, certe tunc temporis non fuit, cum reclamando*
"*nequitiae ejus conſentire noluit.*"

As to the material facts requiſite to be given in evidence and proved upon an indictment of rape, they are of ſuch a nature, that though neceſſary to be known and ſettled, for the conviction of the guilty and preſervation of the innocent, and therefore are to be found in ſuch criminal treatiſes as diſcourſe of theſe matters in detail, yet they are highly improper to be publicly diſcuſſed, except only in a court of juſtice. I ſhall therefore merely add upon this head a few remarks from ſir Matthew Hale; with regard to the competency and credibility of witneſſes; which may, *ſalvo pudore*, be conſidered.

AND, firſt, the party raviſhed may give evidence upon oath, and is in law a competent witneſs; but the credibility of her teſtimony, and how far forth ſhe is to be believed, muſt be left to the jury upon the circumſtances of fact that concur in that teſtimony. For inſtance; if the witneſs be of good fame; if ſhe preſently diſcovered the offence, and made ſearch for the offender; if the party accuſed fled for it; theſe and the like are concurring circumſtances, which give greater probability to her evidence. But, on the other ſide, if ſhe be of evil fame, and ſtand unſupported by others; if ſhe concealed the injury for any conſiderable time after ſhe had opportunity to complain; if the place, where the fact was alleged to be committed, was where it was poſſible ſhe might
[214] have been heard, and ſhe made no outcry: theſe and the like circumſtances carry a ſtrong, but not concluſive, preſumption that her teſtimony is falſe or feigned.

MOREOVER, if the rape be charged to be committed on an infant under twelve years of age, ſhe may ſtill be a competent witneſs, if ſhe hath ſenſe and underſtanding to know

[g] 1 Hal. P. C. 629. 2 Hawk. P. C. 108. [h] *fol.* 147.

the

the nature and obligations of an oath; or even to be ſenſible of the wickedneſs of telling a deliberate lie. Nay, though ſhe hath not, it is thought by ſir Matthew Hale [1] that ſhe ought to be heard without oath, to give the court information; and others have held, that what the child told her mother, or other relations, may be given in evidence, ſince the nature of the caſe admits frequently of no better proof. But it is now ſettled, [Brazier's caſe, before the twelve judges, P. 19 Geo. III.] that no hearſay evidence can be given of the declarations of a child who hath not capacity to be ſworn, nor can ſuch child be examined in court without oath: and that there is no determinate age, at which the oath of a child ought either to be admitted or rejected. Yet, where the evidence of children is admitted, it is much to be wiſhed, in order to render their evidence credible, that there ſhould be ſome concurrent teſtimony, of time, place, and circumſtances, in order to make out the fact; and that the conviction ſhould not be grounded ſingly on the unſupported accuſation of an infant under years of diſcretion. There may be therefore, in many caſes of this nature, witneſſes who are competent, that is, who may be admitted to be heard; and yet, after being heard, may prove not to be credible, or ſuch as the jury is bound to believe. For one excellence of the trial by jury is, that the jury are triers of the credit of the witneſſes, as well as of the truth of the fact.

"IT is true, ſays this learned judge [2], that rape is a moſt "deteſtable crime, and therefore ought ſeverely and impar- "tially to be puniſhed with death; but it muſt be remem- [215] "bered, that it is an accuſation eaſy to be made, hard to be "proved, but harder to be defended by the party accuſed, "though innocent." He then relates two very extraordinary caſes of malicious proſecution for this crime, that had happened within his own obſervation; and concludes thus; "I "mention theſe inſtances, that we may be the more cautious

[1] 1 Hal. P. C. 634. [2] *Ibid.* 635.

"upon

" upon trials of offences of this nature, wherein the court " and jury may with ſo much eaſe be impoſed upon, without " great care and vigilance; the heinouſneſs of the offence " many times tranſporting the judge and jury with ſo much " indignation, that they are overhaſtily carried to the con- " viction of the perſon accuſed thereof, by the confident teſ- " timony of ſometimes falſe and malicious witneſſes."

IV. WHAT has been here obſerved, eſpecially with regard to the manner of proof, which ought to be the more clear in proportion as the crime is the more deteſtable, may be applied to another offence, of a ſtill deeper malignity; the infamous *crime againſt nature*, committed either with man or beaſt. A crime, which ought to be ſtrictly and impartially proved, and then as ſtrictly and impartially puniſhed. But it is an offence of ſo dark a nature, ſo eaſily charged, and the negative ſo difficult to be proved, that the accuſation ſhould be clearly made out: for, if falſe, it deſerves a puniſhment inferior only to that of the crime itſelf.

I WILL not act ſo diſagreeable a part, to my readers as well as myſelf, as to dwell any longer upon a ſubject, the very mention of which is a diſgrace to human nature. It will be more eligible to imitate in this reſpect the delicacy of our Engliſh law, which treats it, in its very indictments, as a crime not fit to be named; " *peccatum illud horribile, inter* " *chriſtianos non nominandum* [k]." A taciturnity obſerved likewiſe by the edict of Conſtantius and Conſtans [l]; " *ubi ſcelus* " *eſt id, quod non proficit ſcire, jubemus inſurgere leges, armari*
[216] " *jura gladio ultore, ut exquiſitis poenis ſubdantur infames, qui* " *ſunt, vel qui futuri ſunt rei.*" Which leads me to add a word concerning it's puniſhment.

THIS the voice of nature and of reaſon, and the expreſs law of God [m], determined to be capital. Of which we have

[k] See in *Rot. Parl.* 50 Edw. I'I. n. 58. a complaint, that a Lombard did commit the ſin " that was not to be " named." (22 Rep. 37.)

[l] *Cod.* 9. 9. 31.

[m] Levit. xx. 13. 15.

a ſignal

a signal instance, long before the Jewish dispensation, by the destruction of two cities by fire from heaven: so that this is an universal, not merely a provincial, precept. And our antient law in some degree imitated this punishment, by commanding such miscreants to be burnt to death [n]; though Fleta [o] says they should be buried alive: either of which punishments was indifferently used for this crime among the antient Goths [p]. But now the general punishment of all felonies is the same, namely, by hanging: and this offence (being in the times of popery only subject to ecclesiastical censures) was made felony without benefit of clergy by statute 25 Hen. VIII. c. 6. revived and confirmed by 5 Eliz. c. 17. And the rule of law herein is, that, if both are arrived at years of discretion, *agentes et consentientes pari poena plectantur* [q].

THESE are all the felonious offences more immediately against the personal security of the subject. The inferior offences, or misdemesnors, that fall under this head, are *assaults, batteries, wounding, false imprisonment, and kidnapping.*

V, VI, VII. WITH regard to the nature of the three first of these offences in general, I have nothing farther to add to what has already been observed in the preceding book of these commentaries [r]; when we considered them as private wrongs, or civil injuries, for which a satisfaction or remedy is given to the party aggrieved. But, taken in a public light, as a breach of the king's peace, an affront to his government, and a damage done to his subjects, they are also indictable and punishable with fines and imprisonment; or with other ignominious corporal penalties, where they are committed with any very atrocious design [s]. As in case of an assault with [217] an intent to murder, or with an intent to commit either of the crimes last spoken of; for which intentional assaults, in the two last cases, indictments are much more usual, than for

[n] Brit c. 9.
[o] l. 1. c. 37.
[p] Stiernh. *de jure Goth.* l. 3. c. 2.
[q] 3 Inst. 59.
[r] See Vol. III. pag. 120.
[s] 1 Hawk. P. C. 65.

the abſolute perpetration of the facts themſelves, on account of the difficulty of proof: or, when both parties are conſenting to an unnatural attempt, it is uſual not to charge any *aſſault*; but that one of them laid hands on the other with intent to commit, and that the other permitted the ſame with intent to ſuffer, the commiſſion of the abominable crime beforementioned. And, in all theſe caſes, beſides heavy fine and impriſonment, it is uſual to award judgment of the pillory.

THERE is alſo one ſpecies of battery, more atrocious and penal than the reſt, which is the beating of a clerk in orders, or clergyman; on account of the reſpect and reverence due to his ſacred character, as the miniſter and embaſſador of peace. Accordingly it is enacted by the ſtatute called *articuli cleri*, 9 Edw. II. c. 3. that if any perſon lay violent hands upon a clerk, the amends for the peace broken ſhall be before the king; that is, by indictment in the king's courts: and the aſſailant may alſo be ſued before the biſhop, that excommunication or bodily penance may be impoſed: which if the offender will redeem by money, to be given to the biſhop, or the party grieved, it may be ſued for before the biſhop; whereas otherwiſe to ſue in any ſpiritual court, for civil damages for the battery, falls within the danger of *praemunire*[t]. But ſuits are, and always were, allowable in the ſpiritual court, for money agreed to be given as a commutation for penance[u]. So that upon the whole it appears, that a perſon guilty of ſuch brutal behaviour to a clergyman, is ſubject to three kinds of proſecution, all of which may be purſued for one and the ſame offence: an indictment, for the breach of the king's peace by ſuch aſſault and battery; a civil action, for the ſpecial damage ſuſtained by the party injured; and a ſuit in the eccleſiaſtical court, firſt, *pro correctione et ſalute*
[218] *animae*, by *enjoining* penance, and then again for ſuch ſum of money as ſhall be agreed on for *taking off* the penance enjoined: it being uſual in thoſe courts to exchange their ſpiritual cenſures for a round compenſation in money[v]; perhaps be-

[t] 2 Inſt. 492. 620.
[u] *Artic. Cler.* 9 *Edw. II. c.* 4. F. N. B. 53.
[v] 2 Roll. Rep. 384.

cauſe

cauſe poverty is generally eſteemed by the moraliſts the beſt medicine *pro ſalute animae*.

VIII. THE two remaining crimes and offences, againſt the perſons of his majeſty's ſubjects, are infringements of their natural liberty: concerning the firſt of which, *falſe impriſonment*, its nature and incidents, I muſt content myſelf with referring the ſtudent to what was obſerved in the preceding volume [w], when we conſidered it as a mere civil injury. But, beſides the private ſatisfaction given to the individual by action, the law alſo demands public vengeance for the breach of the king's peace, for the loſs which the ſtate ſuſtains by the confinement of one of it's members, and for the infringement of the good order of ſociety. We have ſeen before [x], that the moſt atrocious degree of this offence, that of ſending any ſubject of this realm a priſoner into parts beyond the ſeas, whereby he is deprived of the friendly aſſiſtance of the laws to redeem him from ſuch his captivity, is puniſhed with the pains of *praemunire*, and incapacity to hold any office, without any poſſibility of pardon [y]. And we may alſo add, that by ſtatute 43 Eliz. c. 13. to carry any one by force out of the four northern countries, or impriſon him within the ſame, in order to ranſom him or make ſpoil of his perſon or goods, is felony without benefit of clergy in the principals and all acceſſories before the fact. Inferior degrees of the ſame offence, of falſe impriſonment, are alſo puniſhable by indictment, (like aſſaults and batteries,) and the delinquent may be fined and impriſoned [z]. And indeed [a] there can be no doubt, but that all kinds of crimes of a public nature, all diſturbances of the peace, all oppreſſions, and other miſdemeſnors whatſoever, of a notoriouſly evil example, may be indicted at the ſuit of the king.

IX. THE other remaining offence, that of *kidnapping*, being [219] the forcible abduction or ſtealing away of a man, woman,

[w] See Vol. III. pag. 127.
[x] See pag. 116.
[y] Stat. 31 Car. II. c. 2.
[z] Weſt. Symbol. part 2. pag. 92.
[a] 1 Hawk. P. C. 230.

or child, from their own country, and ſending them into another, was capital by the Jewiſh law. "He that ſtealeth "a man, and ſelleth him, or if he be found in his hand, he "ſhall ſurely be put to death [b]." So likewiſe in the civil law, the offence of ſpiriting away and ſtealing men and children; which was called *plagium*, and the offender *plagiarii*, was puniſhed with death [c]. This is unqueſtionably a very heinous crime, as it robs the king of his ſubjects, baniſhes a man from his country, and may in its conſequences be productive of the moſt cruel and diſagreeable hardſhips; and therefore the common law of England has puniſhed it with fine, impriſonment, and pillory [d]. And alſo the ſtatute 11 & 12 W. III. c. 7. though principally intended againſt pirates, has a clauſe that extends to prevent the leaving of ſuch perſons abroad, as are thus kidnapped or ſpirited away; by enacting, that if any captain of a merchant veſſel ſhall (during his being abroad) force any perſon on ſhore, or wilfully leave him behind, or refuſe to bring home all ſuch men as he carried out, if able and deſirous to return, he ſhall ſuffer three months impriſonment. And thus much for offences that more immediately affect the *perſons* of individuals.

[b] Exod. xxi. 16.
[c] *Ff.* 48. 15. 1.
[d] Raym 474. 2 Show. 221. Skin. 47. Comb. 10.

CHAPTER THE SIXTEENTH.

OF OFFENCES AGAINST THE HABITATIONS OF INDIVIDUALS.

THE only two offences, that more immediately affect the *habitations* of individuals or private ſubjects, are thoſe of *arſon* and *burglary*.

1. ARSON, *ab ardendo*, is the malicious and wilful burning of the houſe or outhouſe of another man. This is an offence of very great malignity, and much more pernicious to the public than ſimple theft: becauſe, firſt, it is an offence againſt that right of habitation, which is acquired by the law of nature as well as by the laws of ſociety; next, becauſe of the terror and confuſion that neceſſarily attend it; and laſtly, becauſe in ſimple theft the thing ſtolen only changes its maſter, but ſtill remains in *eſſe* for the benefit of the public, whereas by burning the very ſubſtance is abſolutely deſtroyed. It is alſo frequently more deſtructive than murder itſelf, of which too it is often the cauſe: ſince murder, atrocious as it is, ſeldom extends beyond the felonious act deſigned; whereas fire too frequently involves in the common calamity perſons unknown to the incendiary, and not intended to be hurt by him, and friends as well as enemies. For which reaſon the civil law [a] puniſhes with death ſuch as maliciouſly ſet fire to houſes in towns, and contiguous to others; but is more merciful to ſuch as only fire a cottage, or houſe, ſtanding by itſelf.

[a] *Ff.* 48. 19. 28. § 12.

Our Engliſh law alſo diſtinguiſhes with much accuracy upon this crime. And therefore we will inquire, firſt, what is ſuch a houſe as may be the ſubject of this offence: next, wherein the offence itſelf conſiſts, or what amounts to a burning of ſuch houſe; and laſtly, how the offence is puniſhed.

1. Not only the bare dwelling houſe, but all out-houſes that are parcel thereof, though not contiguous thereto, nor under the ſame roof, as barns and ſtables, may be the ſubject of arſon [b]. And this by the common law: which alſo accounted it felony to burn a ſingle barn in the field, if filled with hay or corn, though not parcel of the dwelling houſe [c]. The burning of a ſtack of corn was antiently likewiſe accounted arſon [d]. And indeed all the niceties and diſtinctions which we meet with in our books, concerning what ſhall, or ſhall not, amount to arſon, ſeem now to be taken away by a variety of ſtatutes; which will be mentioned in the next chapter, and have made the puniſhment of wilful burning equally extenſive as the miſchief. The offence of arſon (ſtrictly ſo called) may be committed by wilfully ſetting fire to one's own houſe, provided one's neighbour's houſe is thereby alſo burnt; but if no miſchief is done but to one's own, it does not amount to felony, though the fire was kindled with intent to burn another's [e]. For by the common law no intention to commit a felony amounts to the ſame crime; though it does, in ſome caſes, by particular ſtatutes. However ſuch wilful firing one's own houſe, *in a town*, is a high miſdemeſnor, and puniſhable by fine, impriſonment, pillory, and perpetual ſureties for the good behaviour [f] (1). And if a landlord or reverſioner ſets fire to his own houſe, of

[b] 1 Hal. P. C. 567.
[c] 3 Inſt. 69.
[d] 1 Hawk. P. C. 105.
[e] Cro. Car. 377. 1 Jon. 351.
[f] 1 Hal. P. C. 568. 1 Hawk. P. C. 106.

(1) An attempt or preparation to ſet fire to one's own houſe in a town, though the fire is never kindled, is a miſdemeſnor.

which

which another is in poſſeſſion under a leaſe from himſelf or from thoſe whoſe eſtate he hath, it ſhall be accounted arſon; for, during the leaſe, the houſe is the property of the tenant [g] (2).

2. As to what ſhall be ſaid to be a *burning*, ſo as to amount [222] to arſon, a bare intent, or attempt to do it, by actually ſetting fire to an houſe, unleſs it abſolutely *burns*, does not fall within the deſcription of *incendit et combuſſit*; which were words neceſſary, in the days of law-latin, to all indictments of this ſort. But the burning and conſuming of any part is ſufficient; though the fire be afterwards extinguiſhed [h]. Alſo it muſt be a *malicious* burning; otherwiſe it is only a treſpaſs: and therefore no negligence or miſchance amounts to it. For which reaſon, though an unqualified perſon, by ſhooting with a gun, happens to ſet fire to the thatch of a houſe, this ſir Matthew Hale determines not to be felony, contrary to the opinion of former writers [i]. But by ſtatute 6 Ann. c. 31. any ſervant, negligently ſetting fire to a houſe or out-houſes, ſhall forfeit 100 *l.* or be ſent to the houſe of correction for eighteen months; in the ſame manner as the Roman law directed, "*eos, qui negligenter ignes apud ſe habuerint, fuſtibus* "*vel flagellis caedi* [k]."

3. THE *puniſhment* of arſon was death by our antient Saxon laws [l]. And, in the reign of Edward the firſt, this ſentence was executed by a kind of *lex talionis*; for the incendiaries were burnt to death [m]: as they were alſo by the Gothic conſtitutions [n]. The ſtatute 8 Hen. VI. c. 6. made the wilful burning of houſes, under ſome ſpecial circumſtances

[g] Foſt. 115.
[h] 1 Hawk. P. C. 106.
[i] 1 Hal. P. C. 569.
[k] *Ff.* 1. 15. 4.
[l] *LL. Inae. c.* 7. [m] Britt. *c.* 9.
[n] Stiernh. *de jure Goth. l.* 3. *c.* 6.

(2) And it has been expreſsly determined, that if a tenant ſet fire to the houſe of his landlord, he is not guilty of arſon. *Breeme's Caſe, Leach*, 195. 209.

therein mentioned, amount to the crime of high treaſon. But it was again reduced to felony by the general acts of Edward VI. and queen Mary; and now the puniſhment of all capital felonies is uniform, namely, by hanging. The offence of arſon was denied the benefit of clergy by ſtatute 21 Hen. VIII. c. 1. but that ſtatute was repealed by 1 Edw. VI. c. 12. and arſon was afterwards held to be ouſted of clergy, with reſpect to the principal offender, only by inference
[223] and deduction from the ſtatute 4 & 5 P. & M. c. 4. which expreſsly denied it to the acceſſory before the fact [o]; though now it is expreſsly denied to the principal in all caſes within the ſtatute 9 Geo. I. c. 22.

II. BURGLARY, or nocturnal houſebreaking, *burgi latrocinium*, which by our antient law was called *hamefecken*, as it is in Scotland to this day, has always been looked upon as a very heinous offence: not only becauſe of the abundant terror that it naturally carries with it, but alſo as it is a forcible invaſion and diſturbance of that right of habitation, which every individual might acquire even in a ſtate of nature; an invaſion, which in ſuch a ſtate would be ſure to be puniſhed with death, unleſs the aſſailant were the ſtronger. But in civil ſociety, the laws alſo come in to the aſſiſtance of the weaker party: and, beſides that they leave him this natural right of killing the aggreſſor, if he can, (as was ſhewn in a former chapter [p],) they alſo protect and avenge him, in caſe the might of the aſſailant is too powerful. And the law of England has ſo particular and tender a regard to the immunity of a man's houſe, that it ſtyles it his caſtle, and will never ſuffer it to be violated with impunity: agreeing herein with the ſentiments of antient Rome, as expreſſed in the words of Tully [q]; "*quid enim ſanctius, quid omni religione "magis munitius, quam domus uniuſcujuſque civium?*" For this reaſon no outward doors can in general be broken open to execute any civil proceſs; though, in criminal cauſes, the public ſafety ſuperſedes the private. Hence alſo in part ariſes the

[o] 11 Rep. 35. 2 Hal. P. C. 346. 347. Foſter. 336.

[p] See pag. 180.

[q] *pro domo*, 41.

animad-

animadverſion of the law upon eaves-droppers, nuſancers, and incendiaries: and to this principle it muſt be aſſigned, that a man may aſſemble people together lawfully (at leaſt if they do not exceed eleven) without danger of raiſing a riot, rout, or unlawful aſſembly, in order to protect and defend his houſe; which he is not permitted to do in any other caſe [r].

THE definition of a burglar, as given us by ſir Edward Coke [s], is, "he that by night breaketh and entereth into a "manſion-houſe, with intent to commit a felony." In this definition there are four things to be conſidered; the *time*, the *place*, the *manner*, and the *intent*. [224]

1. THE *time* muſt be by night, and not by day: for in the day time there is no burglary. We have ſeen [t], in the caſe of juſtifiable homicide, how much more heinous all laws made an attack by night, rather than by day; allowing the party attacked by night to kill the aſſailant with impunity. As to what is reckoned night, and what day, for this purpoſe: antiently the day was accounted to begin only at ſun-riſing, and to end immediately upon ſun-ſet; but the better opinion ſeems to be, that if there be daylight or *crepuſculum* enough, begun or left, to diſcern a man's face withal, it is no burglary [u]. But this does not extend to moonlight; for then many midnight burglaries would go unpuniſhed: and beſides, the malignity of the offence does not ſo properly ariſe from its being done in the dark, as at the dead of night; when all the creation, except beaſts of prey, are at reſt; when ſleep has diſarmed the owner, and rendered his caſtle defenceleſs.

2. As to the *place*. It muſt be, according to ſir Edward Coke's definition, in a *manſion*-houſe; and therefore to account for the reaſon why breaking open a church is burglary,

[r] 1 Hal. P. C. 547.
[s] 3 Inſt. 63.
[t] See pag. 180, 181.
[u] 3 Inſt. 63. 1 Hal. P. C. 350. 1 Hawk. P. C. 101.

as it undoubtedly is, he quaintly obſerves that it is *domus manſionalis Dei* [v]. But it does not ſeem abſolutely neceſſary that it ſhould in all caſes be a manſion-houſe; for it may alſo be committed by breaking the gates or walls of a *town* in the night [w]; though that perhaps ſir Edward Coke would have called the manſion-houſe of the garriſon or corporation. Spelman defines burglary to be, "*nocturna diruptio alicujus*
[225] "*habitaculi, vel eccleſiae, etiam murorum portarumve burgi, ad* "*feloniam perpetrandam.*" And therefore we may ſafely conclude, that the requiſite of its being *domus manſionalis* is only in the burglary of a private houſe: which is the moſt frequent, and in which it is indiſpenſably neceſſary to form its guilt, that it muſt be in a manſion or dwelling houſe. For no diſtant barn, warehouſe, or the like, are under the ſame privileges, nor looked upon as a man's caſtle of defence: nor is a breaking open of houſes wherein no man reſides, and which therefore for the time being are not manſion-houſes, attended with the ſame circumſtances of midnight terror. A houſe however, wherein a man ſometimes reſides, and which the owner hath only left for a ſhort ſeaſon, *animo revertendi*, is the object of burglary; though no one be in it, at the time of the fact committed [x] (3). And if the barn, ſtable, or warehouſe, be parcel of the manſion-houſe and within the ſame common fence [y], though not under the ſame roof or contiguous, a burglary may be committed therein; for the capital houſe protects and privileges all its branches and appurtenants, if within the curtilage or home-ſtall [z]. A chamber in a college or an inn of court, where each inhabitant hath a diſtinct property, is, to all other purpoſes as well as

[v] 3 Inſt. 64.
[w] Spelm. *Gloſſ. t. Burglary.* 1 Hawk. P. C. 103.
[x] 1 Hal. P. C. 566. Foſt. 77.
[y] *Kew. Garland.* P. 16 Geo. III. by all the judges.
[z] 1 Hal. P. C. 558. 1 Hawk. P. C. 104.

(3) Where a houſe is built, purchaſed, or rented, and is under repairs, or is making ready for the reception of the owner's family, no burglary can be committed in it, until the owner, or ſome part of his family, goes to inhabit it. *Lyon's Caſe, Leach*, 169.

this, the manſion-houſe of the owner[a]. So alſo is a room or lodging, in any private houſe, the manſion for the time being of the lodger; if the owner doth not himſelf dwell in the houſe, or if he and the lodger enter by different outward doors. But, if the owner himſelf lies in the houſe, and hath but one outward door at which he and his lodgers enter, ſuch lodgers ſeem only to be inmates, and all their apartments to be parcel of the one dwelling-houſe of the owner[b]. Thus too the houſe of a corporation, inhabited in ſeparate apartments by the officers of the body corporate, is the manſion-houſe of the corporation, and not of the reſpective officers[c]. But if I hire a ſhop, parcel of another man's houſe, and work or trade in it, but never lie there; it is no dwelling-houſe, nor can burglary be committed therein: for by the leaſe [226] it is ſevered from the reſt of the houſe, and therefore is not the dwelling-houſe of him who occupies the other part; neither can I be ſaid to dwell therein, when I never lie there[d] (4). Neither can burglary be committed in a tent or booth erected in a market or fair; though the owner may lodge therein[e]: for the law regards thus highly nothing but permanent edifices; a houſe, or church, the wall or gate of a town; and though it may be the choice of the owner to lodge in ſo fragile a tenement, yet his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted waggon in the ſame circumſtances.

3. As to the *manner* of committing burglary: there muſt be both a breaking and an entry to complete it. But they need not be both done at once: for, if a hole be broken one night, and the ſame breakers enter the next night through the ſame,

[a] 1 Hal. P. C. 556.
[b] Kel. 84. 1 Hal. P. C. 556.
[c] Foſter. 38, 39.
[d] 1 Hal. P. C. 558.
[e] 1 Hawk. P. C. 104.

(4) But where a ſhop was rented with ſome of the apartments of a houſe, it was held that the ſhop was ſtill part of the dwelling-houſe, and that burglary might be committed in it, as the houſe of the landlord. *Gibſon's Caſe, Leach*, 287.

they

they are burglars [f]. There muſt in general be an actual breaking; not a mere legal *clauſum fregit*, (by leaping over inviſible ideal boundaries, which may conſtitute a civil treſpaſs,) but a ſubſtantial and forcible irruption. As at leaſt by breaking, or taking out the glaſs of, or otherwiſe opening, a window: picking a lock, or opening it with a key; nay, by lifting up the latch of a door, or unlooſing any other faſtening which the owner has provided. But if a perſon leaves his doors or windows open, it is his own folly and negligence; and if a man enters therein, it is no burglary: yet, if he afterwards unlocks an inner or chamber door, it is ſo [g]. But to come down a chimney is held a burglarious entry; for that is as much cloſed, as the nature of things will permit [h]. So alſo to knock at a door, and upon opening it to ruſh in, with a felonious intent; or, under pretence of taking lodgings, to fall upon the landlord and rob him; or to procure a conſtable to gain admittance, in order to ſearch for traitors, and then to bind the conſtable and rob the houſe; all theſe entries have been adjudged burglarious, though there was
[227] no actual breaking: for the law will not ſuffer itſelf to be trifled with by ſuch evaſions, eſpecially under the cloke of legal proceſs [i]. And ſo, if a ſervant opens and enters his maſter's chamber-door with a felonious deſign: or if any other perſon lodging in the ſame houſe, or in a public inn, opens and enters another's door, with ſuch evil intent; it is burglary. Nay, if the ſervant conſpires with a robber, and lets him into the houſe by night, this is burglary in both [k]: for the ſervant is doing an unlawful act, and the opportunity afforded him, of doing it with greater eaſe, rather aggravates than extenuates the guilt. As for the entry, any the leaſt degree of it, with any part of the body, or with an inſtrument held in the hand, is ſufficient: as, to ſtep over the threſhold, to put a hand or a hook in at a window to draw out goods, or a piſtol to demand one's money, are all of them

[f] 1 Hal. P. C. 551.
[g] *Ibid* 553.
[h] 1 Hawk. P. C. 102. 1 Hal P. C. 552
[i] 1 Hawk. P. C. 102.
[k] Stra. 881. 1 Hal. P. C. 553. 1 Hawk. P. C. 103.

burglarious

burglarious entries[l](5). The entry may be before the breaking, as well as after: for by ſtatute 12 Ann. c. 7. if a perſon enters into the dwelling-houſe of another, without breaking in, either by day or by night, with intent to commit felony, or, being in ſuch houſe, ſhall commit any felony; and ſhall in the night break out of the ſame, this is declared to be burglary; there having before been different opinions concerning it: lord Bacon[m] holding the affirmative, and ſir Matthew Hale[n] the negative. But it is univerſally agreed, that there muſt be both a breaking, either in fact or by implication, and alſo an entry, in order to complete the burglary.

4. As to the *intent*; it is clear, that ſuch breaking and entry muſt be with a felonious intent, otherwiſe it is only a treſpaſs. And it is the ſame, whether ſuch intention be actually carried into execution, or only demonſtrated by ſome attempt or overt act, of which the jury is to judge. And therefore ſuch a breach and entry of a houſe as has been before deſcribed, by night, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary; [228] whether the thing be actually perpetrated or not. Nor does it make any difference, whether the offence were felony at common law, or only created ſo by ſtatute; ſince that ſtatute, which makes an offence felony, gives it incidentally all the properties of a felony at common law[o].

[l] 1 Hal. P. C. 555. 1 Hawk. P. C. 103. Foſt. 108.
[m] Elem. 65.
[n] 1 Hal. P. C. 554.
[o] 1 Hawk. P. C. 105.

(5) In a caſe where a door had been bored through by an inſtrument, called a *centre-bit*, the end of which muſt have penetrated beyond the internal ſurface of the door, it was held that this was not a ſufficient entry to conſtitute a burglary. When the inſertion of an inſtrument amounts to a burglarious entry, the inſtrument muſt be of ſuch a nature as is calculated to effect the intended felony after the breaking is completed. *Hughes's Caſe, Leach*, 313.

THUS

THUS much for the nature of burglary; which is a felony at common law, but within the benefit of clergy. The ſtatutes however of 1 Edw. VI. c. 12. and 18 Eliz. c. 7. take away clergy from the principals, and that of 3 & 4 W. & M. c. 9. from all abettors and acceſſories before the fact [p]. And, in like manner, the laws of Athens, which puniſhed no ſimple theft with death, made burglary a capital crime [q].

[p] Burglary in any houſe belonging to the plate glaſs company, with intent to ſteal the ſtock or utenſils, is by ſtatute 13 Geo. III. c 38. declared to be ſingle felony, and puniſhed with tranſportation for ſeven years.

[q] Pott, Antiq. b. 1. c. 26.

CHAPTER THE SEVENTEENTH.

OF OFFENCES AGAINST PRIVATE PROPERTY.

THE next, and laſt ſpecies of offences againſt private ſubjects, are ſuch as more immediately affect their property. Of which there are two, which are attended with a breach of the peace; *larciny*, and *malicious miſchief*: and one, that is equally injurious to the rights of property, but attended with no act of violence; which is the crime of *forgery*. Of theſe three in their order.

I. LARCINY, or *theft*, by contraction for latrociny, *latrocinium*, is diſtinguiſhed by the law into two ſorts; the one called *ſimple* larciny, or plain theft unaccompanied with any other atrocious circumſtance; and *mixed* or *compound* larciny, which alſo includes in it the aggravation of a taking from one's houſe or perſon.

AND, firſt, of *ſimple* larciny: which, when it is the ſtealing of goods above the value of twelvepence, is called *grand* larciny; when of goods to that value, or under, is *petit* larciny: offences, which are conſiderably diſtinguiſhed in their puniſhment, but not otherwiſe. I ſhall therefore firſt conſider the nature of ſimple larciny in general; and then ſhall obſerve the different degrees of puniſhment inflicted on its two ſeveral branches.

SIMPLE larciny then is "the felonious taking, and carrying away, of the perſonal goods of another." This offence

fence certainly commenced then, whenever it was, that the bounds of property, or laws of *meum* and *tuum*, were eſtabliſhed. How far ſuch an offence can exiſt in a ſtate of nature, where all things are held to be common, is a queſtion that may be ſolved with very little difficulty. The diſturbance of any individual, in the occupation of what he has ſeiſed to his preſent uſe, ſeems to be the only offence of this kind incident to ſuch a ſtate. But, unqueſtionably, in ſocial communities, when property is eſtabliſhed, the neceſſity whereof we have formerly ſeen [a], any violation of that property is ſubject to be puniſhed by the laws of ſociety: though how far that puniſhment ſhould extend, is matter of conſiderable doubt. At preſent we will examine the nature of theft, or larciny, as laid down in the foregoing definition.

1. IT muſt be a *taking*. This implies the conſent of the owner to be wanting. Therefore no delivery of the goods from the owner to the offender, upon truſt, can ground a larciny. As if A lends B a horſe, and he rides away with him; or, if I ſend goods by a carrier, and he carries them away; theſe are no larcinies [b] (1). But if the carrier opens

[a] See Vol. II. pag. 8, &c. [b] 1 Hal P. C. 504.

(1) But it is now fully eſtabliſhed, that in all caſes where horſes, or carriages are hired and are never returned, if the jury are of opinion from the circumſtances that the perſons to whom they are delivered intended at the time of hiring never to reſtore them, or that the intention to ſteal them or convert them to their own uſe exiſted in their minds at the time they gained poſſeſſion, they are guilty of felony. *Pear's caſe*, and *Major Semple's caſe*, *Leach*, 189 & 327. And where a perſon hires a horſe for a particular time, or to go a ſpecific journey, and after complying with the terms of the ſpecial agreement ſells it, his poſſeſſion being then unſupported by any privity of contract or conſent of the owner, he is held to be guilty of felony. *Ib.* And it is now generally held, that if the poſſeſſion of property is obtained by any contrivance *animo furandi*, as by pretending to find a valuable ring, cutting cards, or laying wagers, or by undertaking to exchange a note into caſh, or gold into ſilver, it amounts to felony. See the reſpective caſes of *Patch*, *Horner*, and *Ackles*, in *Leach*, 206. 226. 239.

a bale or pack of goods, or pierces a veſſel of wine, and takes away part thereof, or if he carries it to the place appointed, and afterwards takes away the whole, theſe are larcinies [c]: for here the *animus furandi* is manifeſt; ſince in the firſt caſe he had otherwiſe no inducement to open the goods, and in the ſecond the truſt was determined, the delivery having taken its effect (2). But bare non-delivery ſhall not of courſe be intended to ariſe from a felonious deſign; ſince that may happen from a variety of other accidents. Neither by the common law was it larciny in any ſervant to run away with the goods committed to him to keep, but only a breach of civil truſt (3). But by ſtatute 33 Hen. VI. c. 1. the ſervants of perſons deceaſed, accuſed of embezzling their maſter's goods, may by writ out of chancery (iſſued by the advice of the chief juſtices and chief baron, or any two of them) and [231] proclamation made thereupon, be ſummoned to appear per-

[c] 3 Inſt. 107.

(2) It has been decided that if a parcel is left by accident in a hackney coach, and the coachman inſtead of reſtoring it to the owner, opens it and embezzles part of it's contents, he is guilty of larceny. *Wynne's caſe, Leach*, 320.

(3) In moſt caſes the judges had determined that the property of the maſter delivered by him into the cuſtody of the ſervant ſtill remained in the poſſeſſion of the maſter, and if it was embezzled by the ſervant or converted to his uſe, he was guilty of felony. But to remove doubts which had exiſted reſpecting embezzlements by merchants' and bankers' clerks, it was enacted by the 39 Geo. III. c. 85. that if any ſervant or clerk ſhould by virtue of his employment receive any money, bills, or any valuable ſecurity, or effects, in the name, or on the account, of his maſter or employer, and ſhould afterwards embezzle any part of the ſame, he ſhould be deemed to have feloniouſly ſtolen the ſame, and ſhould be ſubject to tranſportation for any term not exceeding fourteen years.

When ſervants are convicted of robbing their maſters, as the ſecurity of families ſo much depends upon their honeſty, and as the violation of the confidence repoſed in them is a high aggravation of the crime, they are always puniſhed with the utmoſt rigour, which the law admits.

ſonally in the court of king's bench, to anſwer their maſter's executors in any civil ſuit for ſuch goods; and ſhall, on default of appearance, be attainted of felony. And by ſtatute 21 Hen. VIII. c. 7. if any ſervant embezzles his maſter's goods to the value of forty ſhillings, it is made felony; except in apprentices, and ſervants under eighteen years old. But if he had not the poſſeſſion, but only the care and overſight of the goods, as the butler of plate, the ſhepherd of ſheep, and the like, the embezzling of them is felony at common law [d]. So if a gueſt robs his inn or tavern of a piece of plate, it is larciny; for he hath not the poſſeſſion delivered to him, but merely the uſe [e], and ſo it is declared to be by ſtatute 3 & 4 W. & M. c. 9. if a lodger runs away with the goods from his ready furniſhed lodgings. Under ſome circumſtances alſo a man may be guilty of felony in taking his own goods: as if he ſteals them from a pawnbroker, or any one to whom he hath delivered and entruſted them, with intent to charge ſuch bailee with the value; or if he robs his own meſſenger on the road, with intent to charge the hundred with the loſs according to the ſtatute of Wincheſter [f].

2. THERE muſt not only be a taking, but a *carrying away: cepit et aſportavit* was the old law-latin. A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a ſufficient aſportation, or carrying away. As if a man be leading another's horſe out of a cloſe, and be apprehended in the fact; or if a gueſt, ſtealing goods out of an inn, has removed them from his chamber down ſtairs; theſe have been adjudged ſufficient carryings away, to conſtitute a larciny [g]. Or if a thief, intending to ſteal plate, takes it out of a cheſt in which it was, and lays it down upon the floor, but is ſurprized before he can make his eſcape with it; this is larciny [h] (4).

[d] 1 Hal. P. C. 506.
[e] 1 Hawk. P. C. 90.
[f] Foſter. 123, 124.
[g] 3 Inſt. 108, 109.
[h] 1 Hawk. P. C. 93.

(4) Where a man ſnatched an ear-ring from a lady's ear, and afterwards dropped it in her hair, it was held a ſufficient carrying away

3. THIS taking, and carrying away, muſt alſo be *felonious*; that is, done *animo furandi*: or, as the civil law expreſſes it, *lucri cauſa* [i]. This requiſite, beſides excuſing thoſe who labour under incapacities of mind or will, (of whom we ſpoke ſufficiently at the entrance of this book [k],) indemnifies alſo mere treſpaſſers, and other petty offenders. As if a ſervant takes his maſter's horſe, without his knowlege, and brings him home again: if a neighbour takes another's plough, that is left in the field, and uſes it upon his own land, and then returns it: if, under colour of arrear of rent, where none is due, I diſtrein another's cattle, or ſeiſe them: all theſe are miſdemeſnors and treſpaſſes, but no felonies [l]. The ordinary diſcovery of a felonious intent is where the party doth it clandeſtinely; or, being charged with the fact, denies it. But this is by no means the only criterion of criminality: for in caſes that may amount to larciny the variety of circumſtances is ſo great, and the complications thereof ſo mingled, that it is impoſſible to recount all thoſe, which may evidence a felonious intent, or *animum furandi*: wherefore they muſt be left to the due and attentive conſideration of the court and jury.

4. THIS felonious taking and carrying away muſt be *of the perſonal goods of another*: for if they are things *real*, or ſavour of the realty, larciny at the common law cannot be committed of them. Lands, tenements, and hereditaments (either

[i] Inſt. 4. 1. 1. [k] See pag. 20. [l] 1 Hal. P. C. 509.

away to conſtitute a robbery. *Lapier's caſe, Leach*, 264. The removal of a parcel from one end of a waggon to the other, with an intent to ſteal, amounted to a larciny. *Ibid.* 204. But where a bale of goods was raiſed and placed upon it's end in a perpendicular poſture, this was thought not to be a ſufficient carrying away, there not being a complete removal from the ſpace it before occupied. *Ibid.* And where a man was ſtopped and ordered by the priſoner to put down upon the ground a parcel, which he was carrying, but which the priſoner did not afterwards take up, this was held not a ſufficient aſportation to complete the crime of robbery. *Farrel's caſe, Ibid.* 266.

corporeal or incorporeal) cannot in their nature be taken and carried away. And of things likewiſe that adhere to the freehold, as corn, graſs, trees, and the like, or lead upon a houſe, no larciny could be committed by the rules of the common law; but the ſeverance of them was, and in many things is ſtill, merely a treſpaſs which depended on a ſubtilty in the legal notions of our anceſtors. Theſe things were parcel of the real eſtate; and therefore, while they continued ſo, could not by any poſſibility be the ſubject of theft, being abſolutely fixed and immoveable [m]. And if they were
[233] ſevered by violence, ſo as to be changed into moveables; and at the ſame time, by one and the ſame continued act, carried off by the perſon who ſevered them; they could never be ſaid to be taken *from* the *proprietor*, in this their newly acquired ſtate of mobility, (which is eſſential to the nature of larciny,) being never, as ſuch, in the actual or conſtructive poſſeſſion of any one, but of him who committed the treſpaſs. He could not in ſtrictneſs be ſaid to have taken what at that time were the perſonal goods of another, ſince the very act of taking was what turned them into perſonal goods. But if the thief ſevers them at *one* time, whereby the treſpaſs is completed, and they are converted into perſonal chattels, in the conſtructive poſſeſſion of him on whoſe ſoil they are left or laid; and comes again at *another* time, when they are ſo turned in perſonalty, and takes them away; it is larciny: and ſo it is, if the owner, or any one elſe, has ſevered them [n]. And now, by the ſtatute 4 Geo. II. c. 32. to ſteal, or rip, cut, or break, with intent to ſteal, any lead, or iron bar, rail, gate, or paliſado, fixed to a dwelling houſe or out-houſe, or in any court or garden thereunto belonging, or to any other building, is made felony, liable to tranſportation for ſeven years; and to ſteal, damage, or deſtroy underwood or hedges, and the like, to rob orchards or gardens of fruit growing therein, to ſteal or otherwiſe deſtroy any turnips, potatoes, cabbages, parſnips, peaſe, or carrots, or the roots of madder when growing, are [o] puniſhable criminally, by whipping,

[m] See Vol. II. p. 16.
[n] 3 Inſt. 109. 1 Hal. P. C. 510.
[o] Stat. 43 Eliz. c. 7. 15 Car. II. c. 2. 31 Geo. II. c. 35. 6 Geo. III. c. 48. 9 Geo. III. c. 41. 13 Geo. III. c. 32.

ſmall

ſmall fines, impriſonment, and ſatisfaction to the party wronged, according to the nature of the offence. Moreover, the ſtealing by night of any trees, or of any roots, ſhrubs, or plants to the value of 5 *s.* is by ſtatute 6 Geo. III. c. 36. made felony in the principals, aiders, and abettors, and in the purchaſers thereof knowing the ſame to be ſtolen: and by ſtatute 6 Geo. III. c. 48. and 13 Geo. III. c. 33. the ſtealing of any timber trees therein ſpecified [p], and of any root, ſhrub, or plant, by day or night, is liable to pecuniary [234] penalties for the two firſt offences, and for the third is conſtituted a felony liable to tranſportation for ſeven years. Stealing ore out of mines is alſo no larciny, upon the ſame principle of adherence to the freehold; with an exception only to mines of black lead, the ſtealing of ore out of which, or entering the ſame with intent to ſteal, is felony, puniſhable with impriſonment and whipping, or tranſportation not exceeding ſeven years; and to eſcape from ſuch impriſonment, or return from ſuch tranſportation, is felony without benefit of clergy; by ſtatute 25 Geo. II. c. 10. Upon nearly the ſame principle the ſtealing of writings relating to a real eſtate is no felony, but a treſpaſs [q]: becauſe they concern the land, or (according to our technical language) *ſavour* of the *realty*, and are conſidered as part of it by the law; ſo that they deſcend to the heir together with the land which they concern [r].

BONDS, bills, and notes, which concern mere *choſes in action*, were alſo at the common law held not to be ſuch goods whereof larciny might be committed; being of no intrinſic value [s], and not importing any property in *poſſeſſion* of the perſon from whom they are taken. But by the ſtatute 2 Geo. II. c. 25. they are now put upon the ſame footing, with reſpect to larcinies, as the money they were meant to ſecure. By ſtatute 15 Geo. II. c. 13. officers or ſervants of the bank of England, ſecreting or embezzling any note, bill, warrant, bond, deed, ſecurity, money, or effects, intruſted with them

[p] Oak, beech, cheſnut, walnut, aſh, elm, cedar, fir, aſp, lime, ſycamore, birch, poplar, alder, larch, maple, and hornbeam.

[q] 1 Hal. P. C. 510. Stra. 1137.

[r] See Vol. II. pag. 438.

[s] 8 Rep. 33.

or with the company, are guilty of felony without benefit of clergy. The ſame is enacted by ſtatute 24 Geo. II. c. 11. with reſpect to officers and ſervants of the ſouth-ſea company. And, by ſtatute 7 Geo. III. c. 50. if any officer or ſervant of the poſt-office ſhall ſecrete, embezzle, or deſtroy any letter or pacquet, containing any bank note or other valuable paper particularly ſpecified in the act, or ſhall ſteal the ſame out of any letter or pacquet, he ſhall be guilty of felony without benefit of clergy (5). Or, if he ſhall deſtroy any letter or pac-
[235] quet with which he has received money for the poſtage, or ſhall advance the rate of poſtage on any letter or packet ſent by the poſt, and ſhall ſecrete the money received by ſuch advancement, he ſhall be guilty of ſingle felony. Larciny alſo could not at common law be committed of treaſure-trove, or wreck, till ſeized by the king or him who hath the franchiſe: for till ſuch ſeiſure no one hath a determinate property therein. But, by ſtatute 26 Geo. II. c. 19. plundering or ſtealing from any ſhip in diſtreſs (whether wreck or no wreck) is felony without benefit of clergy: in like manner, as, by the civil law[s], this inhumanity is puniſhed in the ſame degree as the moſt atrocious theft.

LARCINY alſo cannot be committed of ſuch animals, in which there is no property either abſolute or qualified; as of beaſts that are *ferae naturae*, and unreclaimed, ſuch as deer, hares, and conies, in a foreſt, chace, or warren; fiſh, in an open river or pond; or wild fowls at their natural liberty[t]. But if they are reclaimed or confined, and may ſerve for food, it is otherwiſe, even at common law: for of deer ſo incloſed in a park that they may be taken at pleaſure, fiſh in a trunk, and pheaſants or partridges in a mew, larciny may

[s] *Cod.* 6. 2. 18. [t] 1 Hal. P. C. 511. Foſt. 365.

(5) To ſecrete a letter containing money, is not an offence within this ſtatute, but will be a ſimple larceny, or a larceny in a dwelling-houſe, according to the circumſtances of the caſe. *Skutt's caſe, Leach*, 100.

be

be committed [u]. And now, by ſtatute 9 Geo. I. c. 22. to hunt, wound, kill, or ſteal any deer; to rob a warren; or to ſteal fiſh from a river or pond (being in theſe caſes armed and diſguiſed); alſo to hunt, wound, kill, or ſteal any deer, in the king's foreſts or chaſes incloſed, or in any other incloſed place where deer have been uſually kept; or by gift or promiſe of reward to procure any perſon to join them in ſuch unlawful act; all theſe are felonies without benefit of clergy. And the ſtatute 16 Geo. III. c. 30. enacts, that every unauthorized perſon, his aiders and abettors, who ſhall courſe, hunt, ſhoot at, or otherwiſe attempt to kill, wound, or deſtroy any red or fallow deer in *any* foreſt, chaſe, purlieu, or antient walk, or in any *incloſed* park, paddock, wood, or other ground, where deer are uſually kept, ſhall forfeit the ſum of 20*l.* or [236] for every deer actually killed, wounded, deſtroyed, taken in any toyl or ſnare, or carried away, the ſum of 30*l.* or double thoſe ſums in caſe the offender be a keeper: and, upon a ſecond offence, (whether of the ſame or a different ſpecies,) ſhall be guilty of felony, and tranſportable for ſeven years. Which latter puniſhment is likewiſe inflicted on all perſons armed with offenſive weapons, who ſhall come into ſuch places with an intent to commit any of the ſaid offences, and ſhall there unlawfully beat or wound any of the keepers in the execution of their offices, or ſhall attempt to reſcue any perſon from their cuſtody. Alſo by ſtatute 5 Geo. III. c. 14. the penalty of tranſportation for ſeven years is inflicted on perſons ſtealing or taking fiſh in any water within a park, paddock, garden, orchard, or yard: and on the receivers, aiders, and abettors: and the like puniſhment, or whipping, fine, or impriſonment, is provided for the taking or killing of coins [v] by night in open warrens: and a forfeiture of five pounds, to the owner of the fiſhery, is made payable by perſons taking or deſtroying (or *attempting* ſo to do) any fiſh in any river or other water within any incloſed ground, being private property. Stealing hawks, in diſobedience to the rules preſcribed by the ſtatute 37 Edw. III.

[u] 1 Hawk. P. C. 94. 1 Hal. P. C. 511. [v] See Stat. 22 & 23 Car. II. c. 25.

c. 19. is alſo felony [w]. It is alſo ſaid [x] that, if ſwans be lawfully marked, it is felony to ſteal them, though at large in a public river; and that it is likewiſe felony to ſteal them, though unmarked, if in any private river or pond; otherwiſe it is only a treſpaſs. But of all valuable domeſtic animals, as horſes and other beaſts of draught, and of all animals *domitae naturae*, which ſerve for food, as neat or other cattle, ſwine, poultry, and the like, and of their fruit or produce, taken from them while living, as milk or wool [y], larciny may be committed; and alſo of the fleſh of ſuch as are either *domitae* or *ferae naturae*, when killed [z]. As to thoſe animals, which do not ſerve for food, and which therefore the law holds to have no intrinſic value, as dogs of all ſorts, and other creatures kept for whim and pleaſure, though a man may have a baſe property therein, and maintain a civil action for the loſs of them [a], yet they are not of ſuch eſtimation, as that the crime of ſtealing them amounts to larciny [b]. But by ſtatute 10 Geo. III. c. 18. very high pecuniary penalties, or a long impriſonment and whipping in their ſtead, may be indicted by two juſtices of the peace, (with a very extraordinary mode of appeal to the quarter ſeſſions,) on ſuch as ſteal, or knowingly harbour a ſtolen *dog*, or have in their cuſtody the ſkin of a dog that has been ſtolen [c] (6).

[w] 3 Inſt. 98.
[x] Dalt. Juſt c 156.
[y] Dal. 21. Crompt. 36. 1 Hawk. P. C. 93. 1 Hal. P. C. 507. The King v. Martin, by all the judges. P. 17 Geo. III.
[z] 1 Hal P. C. 511.
[a] See Vol. II. pag. 393.
[b] 1 Hal. P. C. 512.
[c] See the remarks in pag. 4. This ſtatute hath now continued ſixteen ſeſſions of parliament unrepealed!

(6) This ſtatute ſcarcely deſerves the cenſure conveyed in the learned judge's note; for though many perſons may not eſtimate at a high rate the intrinſic value of this kind of property, yet dogs are frequently the favourites of their owners, and few thieves who are guilty of ſtealing dogs, would confine their depredations to this ſingle article. The penalty for the firſt offence is only from 20 to 30 pounds, and if paid no farther puniſhment can be inflicted. Dr. Burn ſeems to have ſuggeſted a very idle doubt, whether a man

NOTWITHSTANDING however that no larciny can be committed, unleſs there be ſome property in the thing taken, and an owner; yet, if the owner be unknown, provided there be a property, it is larciny to ſteal it; and an indictment will lie, for the goods of a perſon unknown [c]. In like manner as, among the Romans, the *lex Hoſtilia de furtis*, provided that a proſecution for theft might be carried on without the intervention of the owner [d]. This is the caſe of ſtealing a ſhroud out of a grave; which is the property of thoſe, whoever they were, that buried the deceaſed: but ſtealing the corpſe itſelf, which has no owner, (though a matter of great indecency,) is no felony, unleſs ſome of the gravecloths be ſtolen with it [e]. Very different from the law of the Franks, [237] which ſeems to have reſpected both as equal offences; when it directed that a perſon, who had dug a corpſe out of the ground in order to ſtrip it, ſhould be baniſhed from ſociety, and no one ſuffered to relieve his wants, till the relations of the deceaſed conſented to his readmiſſion [f].

HAVING thus conſidered the general nature of ſimple larciny, I come next to treat of its *puniſhment*. Theft, by the Jewiſh law, was only puniſhed with a pecuniary fine, and ſatisfaction to the party injured [g]. And in the civil law, till ſome very late conſtitutions, we never find the puniſhment capital. The laws of Draco at Athens puniſhed it with death: but his laws were ſaid to be written in blood; and Solon afterwards changed the penalty to a pecuniary mulct. And ſo the Attic laws in general continued [h]; except that

[c] 1 Hal. P. C. 512.
[d] Gravin. *l.* 3. §. 106.
[e] See Vol. II. pag. 429.
[f] Monteſq. Sp. L. b. 30. ch. 19.
[g] Exod. c. xxii.
[h] Petit. *LL. Attic. l.* 7. *tit.* 5.

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man under this ſtatute can be convicted for ſtealing a bitch, as the word *dog* alone is uſed throughout the ſtatute. *(tit. Dogs.)* When it is neceſſary to diſtinguiſh the ſexes, we are obliged to reſort to the word bitch, but we have no other word than *dogs* to comprize the whole canine ſpecies of both ſexes, in which ſenſe it unqueſtionably was uſed by the legiſlature in this ſtatute.

once, in a time of death, it was made capital to break into a garden, and ſteal figs: but this law, and the informers againſt the offence, grew ſo odious, that from them all malicious informers were ſtyled ſycophants; a name which we have much perverted from its original meaning. From theſe examples, as well as the reaſon of the thing, many learned and ſcrupulous men have queſtioned the propriety, if not lawfulneſs, of inflicting capital puniſhment for ſimple theft [i]. And certainly the natural puniſhment for injuries to property ſeems to be the loſs of the offender's own property: which ought to be univerſally the caſe, were all men's fortunes equal. But as thoſe, who have no property themſelves, are generally the moſt ready to attack the property of others, it has been
[238] found neceſſary inſtead of a pecuniary to ſubſtitute a corporal puniſhment; yet how far this corporal puniſhment ought to extend, is what has occaſioned the doubt. Sir Thomas More [j], and the marquis Beccaria [k], at the diſtance of more than two centuries from each other, have very ſenſibly propoſed that kind of corporal puniſhment, which approaches the neareſt to a pecuniary ſatisfaction; *viz.* a temporary impriſonment, with an obligation to labour, firſt for the party robbed, and afterwards for the public, in works of the moſt ſlaviſh kind: in order to oblige the offender to repair, by his induſtry and diligence, the depredations he has committed upon private property and public order. But notwithſtanding all the remonſtrances of ſpeculative politicians and moraliſts, the puniſhment of theft ſtill continues, throughout the greateſt part of Europe, to be capital: and Puffendorf [l], together with ſir Matthew Hale [m], are of opinion that this muſt always

[i] *Eſt enim ad vindicanda furta nimis atrox, nec tamen ad refraenanda ſufficiens quippe neque furtum ſimplex tam ingens facinus eſt, ut capite debeat plecti; neque ulla poena eſt tanta, ut ab latrociniis cohibeat eos, qui nullam aliam artem quaerendi victus habent.* (Mori *Utopia.* edit. *Glaſg.* 1750. *pag.* 21.)—*Denique, cum lex Moſaica, quanquam inclemens et aſpera, tamen pecunia furtum, haud morte, mulctavit; nec putemus Deum, in nova lege clementiae qua pater imperat filiis, majorem indulſiſſe nobis invicem ſaeviendi licentiam. Haec ſunt cur non licere putem: quam vere ſit abſurdum, atque etiam perniciosum reipublicae, furem atque homicidam ex aequo puniri, nemo eſt (opinor) qui neſciat.* (*Ibid.* 39.)

[j] *Utop. pag.* 42.

[k] ch. 22.

[l] L. of N. b. 8. c. 3.

[m] 1 Hal. P. C. 13.

he referred to the prudence of the legiſlature; who are to judge, ſay they, when crimes are become ſo enormous as to require ſuch ſanguinary reſtrictions[n]. Yet both theſe writers agree, that ſuch puniſhment ſhould be cautiouſly inflicted, and never without the utmoſt neceſſity.

OUR antient Saxon laws nominally puniſhed theft with death, if above the value of twelvepence: but the criminal was permitted to redeem his life by a pecuniary ranſom; as, among their anceſtors the Germans, by a ſtated number of cattle[o]. But in the ninth year of Henry the firſt, this power of redemption was taken away, and all perſons guilty of larciny above the value of twelvepence were directed to be hanged; which law continues in force to this day[p]. For though the inferior ſpecies of theft, or petit larciny, is only puniſhed by impriſonment or whipping at common law[q], or by ſtatute 4 Geo. I. c. 11. may be extended to tranſportation for ſeven years, as is alſo expreſsly directed in the caſe of the plate-glaſs company[r], yet the puniſhment of grand larciny, or the ſtealing above the value of twelvepence, [239] (which ſum was the ſtandard in the time of king Athelſtan, eight hundred years ago,) is at common law regularly death. Which, conſidering the great intermediate alteration[s] in the price of denomination of money, is undoubtedly a very rigorous conſtitution; and made ſir Henry Spelman (above a century ſince, when money was at twice it's preſent rate) complain, that while every thing elſe was riſen in it's nominal value, and become dearer, the life of man had continually grown cheaper[t]. It is true, that the mercy of juries will often make them ſtrain a point, and bring in larciny to be under the value of twelvepence, when it is really of much

[n] See pag. 9.

[o] Tac. *de mor. Germ. c.* 12.

[p] 1 Hal. P. C. 12. 3 Inſt. 53.

[q] 3 Inſt. 218.

[r] Stat. 13 Geo. III. c. 38.

[s] In the reign of king Henry I. the ſtated value at the exchequer, of a paſture fed ox was one ſhilling: (*Dial. de Scacc. l.* 1. § 7.) which if we ſhould even ſuppoſe to mean the *ſolidus legalis* mentioned by Lyndewode (*Prov. l.* 3. *c.* 13. See Vol. II. page 509.) or the 72d part of a pound of gold, is only equal to 13*s.* 4*d.* of the preſent ſtandard.

[t] *Gloſſ.* 350.

greater

greater value (7): but this, though evidentally juſtifiable and proper, when it only reduces the preſent nominal value of money to the antient ſtandard [u], is otherwiſe a kind of pious perjury, and does not at all excuſe our common law in this reſpect from the imputation of ſeverity, but rather ſtrongly confeſſes the charge. It is likewiſe true, that by the merciful extenſions of the benefit of clergy by our modern ſtatute law, a perſon who commits a ſimple larciny to the value of thirteen pence or thirteen hundred pounds, though guilty of a capital offence, ſhall be excuſed the pains of death: but this is only for the firſt offence. And in many caſes of ſimple larciny the benefit of clergy is taken away by ſtatute: as from horſeſtealing in the principals, and acceſſories both *before* and *after* the fact [w]; theft by great and notorious thieves in Northumberland and Cumberland [x]; taking woollen cloth from off the tenters [y], or linens, fuſtians, callicoes, or cotton goods, from the place of manufacture [z] (8);

[240]

[u] 2 Inſt. 189.

[w] Stat. 1 Edw. VI. c. 12. 2 & 3 Edw. VI. c. 33. 31 Eliz. c. 12.

[x] Stat. 18 Car. II. c. 3.

[y] Stat. 22 Car. II. c. 5. But, as it ſometimes is difficult to prove the identity of the goods ſo ſtolen, the *onus probandi* with reſpect to innocence is now by ſtatute 15 Geo. II. c. 27. thrown on the perſons in whoſe cuſtody ſuch goods are found: the failure whereof is, for the firſt time, a miſdemeſnor puniſhable by forfeiture of the treble value; for the ſecond, by imprisonment alſo; and the third time it becomes a felony, puniſhed with tranſportation for ſeven years.

[z] Stat. 18 Geo. II. c. 27. Note, in the three laſt caſes an option is given to the judge to tranſport the offender; for *life* in the firſt caſe, for *ſeven years* in the ſecond, and for *fourteen years* in the third;—in the firſt and third caſes *inſtead of* ſentence of death, in the ſecond *after* ſentence is given.

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(7) In a proſecution for a ſimple larciny, it is immaterial to the priſoner whether he is convicted of grand or petty larciny, the puniſhment of both being now the ſame, except that upon a ſecond conviction for grand larceny he may be deprived of the benefit of clergy.

(8) J. Hugill was indicted at York for ſtealing yarn out of a bleaching ground. The evidence was, that the yarn had been ſpread upon the ground, but it was taken up and thrown into heaps in order to be carried into the houſe, and in that ſtate ſome of

(which extends, in the laſt caſe, to aiders, aſſiſters, procurers, buyers, and receivers;) feloniouſly driving away, or otherwiſe ſtealing one or more ſheep or other cattle ſpecified in the acts (9), or killing them with intent to ſteal the whole or any part of the carcaſe [a], or aiding or aſſiſting therein; thefts on navigable rivers above the value of forty ſhillings [b], or being preſent, aiding, and aſſiſting thereat; plundering veſſels in diſtreſs, or that have ſuffered ſhipwreck [c]; ſtealing letters ſent by the poſt [d]; and alſo ſtealing deer, fiſh, hares, and conies under the peculiar circumſtances mentioned in the Waltham black act [e]. Which additional ſeverity is owing to the great malice and miſchief of the theft in ſome of theſe inſtances; and, in others, to the difficulties men would otherwiſe lie under to preſerve thoſe goods, which are ſo eaſily carried off. Upon which laſt principle the Roman law puniſhed more ſeverely than other thieves the *abigei*, or ſtealers of cattle [f]; and the *balnearii*, or ſuch as ſtole the cloaths of perſons who were waſhing in the public baths [g]; both which conſtitutions ſeem to be borrowed from the laws of Athens [h]. And ſo too the antient Goths puniſhed with unrelenting ſeverity thefts of cattle, or corn that was reaped and left in the field: ſuch kind of property (which no human induſtry can ſufficiently guard) being eſteemed under the peculiar cuſtody of heaven [i]. And thus much for the offence of *ſimple* larciny.

[a] Stat. 14 Geo. II. c. 6. 15 Geo. II. c. 34. See vol. I. pag. 88.
[b] Stat. 24 Geo. II. c. 45.
[c] Stat. 12 Ann. ſt. 2. c. 18. 26. Geo. II. c. 19.
[d] Stat. 7 Geo. III. c. 50.
[e] Stat. 9 Geo. I. c. 22.
[f] *Ff.* 47. *t.* 14.
[g] *Ibid. t.* 17.
[h] Pott. Antiq. b. 1. c. 26.
[i] Stiernh. *de jure. Goth. l.* 3. *c.* 5.

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of it was ſtolen by the priſoner. Mr. Baron Thompſon held this theft was not within the ſtatute for the protection of bleaching grounds, as there was no occaſion to leave it on the ground in that ſtate.

(9) The cattle ſpecified are horned cattle of every deſcription; and the benefit of clergy has not yet been taken away from the ſimple ſtealing of mules, aſſes, or ſwine.

MIXED,

MIXED, or *compound* larciny is such as has all the properties of the former, but is accompanied with either one, or both, of the aggravations of a taking from one's *house* or *person*. First therefore of larciny from the *house*, and then of larciny from the *person*.

[241] 1. LARCINY from the *house*, though it seems (from the considerations mentioned in the preceding chapter [j]) to have a higher degree of guilt than simple larciny, yet is not at all distinguished from the other at common law [k]: unless where it is accompanied with the circumstance of breaking the house by night; and then we have seen that it falls under another description, *viz.* that of burglary. But now by several acts of parliament (the history of which is very ingeniously deduced by a learned modern writer [l], who hath shewn them to have gradually arisen from our improvements in trade and opulence) the benefit of clergy is taken from larcinies committed in an house in almost every instance; except that larciny of the stock or utensils of the plate-glass company from any of their houses, &c. is made only single felony, and liable to transportation for seven years [m]. The multiplicity of the general acts is apt to create some confusion; but upon comparing them diligently we may collect, that the benefit of clergy is denied upon the following domestic aggravations of larciny; *viz.* First, in larcinies *above the value of twelvepence*, committed, 1. In a church or chapel, with or without violence, or breaking the same [n]: 2. In a booth or tent in a market or fair, in the day time or in the night, by violence or breaking the same; the owner or some of his family being therein [o]: 3. By robbing a dwelling-house in the day time (which *robbing* implies a breaking) any person being therein [p]: 4. In a dwelling-house by day or by night, without breaking the same, any person being therein and put in fear [q]; which amounts in law to a robbery: and in both these last cases the accessory

[j] See pag. 223.
[k] 1 Hawk. P. C. 98.
[l] Barr. 375, &c.
[m] Stat. 13 Geo. III. c. 38.
[n] Stat. 23 Hen. VIII. c. 1. 1 Edw. VI. c. 12. 1 Hal. P. C. 518.
[o] Stat. 5 & 6 Edw. VI. c. 9. 1 Hal. P. C. 522.
[p] Stat. 3 & 4 W. & M. c. 9.
[q] *Ibid.*

before

before the fact is alſo excluded from his clergy. Secondly, in larcinies *to the value of five ſhillings*, committed, 1. By breaking any dwelling-houſe, or any out-houſe, ſhop, or warehouſe thereunto belonging in the day time, although no perſon be therein[r]; which alſo now extends to aiders, abettors, and acceſſories before the fact[s]: 2. By privately ſtealing goods, [242] wares, or merchandize in any ſhop, wharehouſe[t], coachhouſe or ſtable, by day or by night; though the ſame be not broken open, and though no perſon be therein[u]: which likewiſe extends to ſuch as aſſiſt, hire, or command the offence to be committed (10). Laſtly, in larcinies *to the value of forty ſhillings* in a dwelling houſe, or its out-houſes, although the ſame be not broken, and whether any perſon be therein or no; unleſs committed againſt their maſters by apprentices under the age of fifteen[v]. This alſo extends to thoſe, who aid or aſſiſt in the commiſſion of any ſuch offence (11).

[r] Stat. 39 Eliz. c. 15.
[s] Stat. 3 & 4 W. & M. c. 9.
[t] See Foſter. 78. Barr. 379.
[u] Stat. 10 & 11 W. III. c. 23.
[v] Stat. 12 Ann. ſtat. 1. c. 7.

(10) It has been held that privately ſtealing money to the amount of five ſhillings, is not within the ſtatute 10 & 11 W. 3. c. 23. Shops and warehouſes when they are uſed merely as repoſitories of goods, and not as places of ſale, are not within the act, and conſequently a priſoner cannot be convicted of privately ſtealing in a ſhop an article, which is not expoſed there for ſale, but which happens to be left there to be repaired, or for ſome other ſimilar purpoſe. And with regard to coach-houſes and ſtables, the articles muſt be ſuch as are generally depoſited there. *Foſt.* 78. *Leach*, 43. 235. 248. 274.—In proſecutions under this ſtatute, it is held not to be privately ſtealing if any perſon whatever ſee or perceive the theft at the time it is committed. And where there are ſeveral ſhopmen employed in a ſhop, they muſt appear at the trial to prove they did not perceive the theft, or the judge will direct the jury to preſume that the ſtealing was not done privately.

(11) A perſon cannot be convicted capitally for ſtealing to the value of 40 *s.* in his own houſe, nor a wife in her huſband's houſe. *Thompſon's caſe*, *Leach*, 277. Upon an indictment for burglariouſly breaking

2. LARCINY from the *perſon* is either by *privately* ſtealing; or by open and violent aſſault, which is uſually called *robbery*.

THE offence of *privately* ſtealing from a man's *perſon*, as by picking his pocket or the like, privily without his knowlege, was debarred of the benefit of clergy, ſo early as by the ſtatute 8 Eliz. c. 4. But then it muſt be ſuch a larciny, as ſtands in need of the benefit of clergy, *viz.* of above the value of twelvepence; elſe the offender ſhall not have judgment of death. For the ſtatute creates no new offence; but only prevents the priſoner from praying the benefit of clergy, and leaves him to the regular judgment of the antient law[w]. This ſeverity (for a moſt ſevere law it certainly is) ſeems to be owing to the eaſe with which ſuch offences are committed, the difficulty of guarding againſt them, and the boldneſs with which they were practiſed (even in the queen's court and preſence) at the time when this ſtatute was made: beſides that this is an infringement of property, in the manual occupation or corporal poſſeſſion of the owner, which was an offence even in a ſtate of nature. And therefore the *ſaccularii*, or cutpurſes, were more ſeverely puniſhed than common thieves by the Roman and Athenian laws[x] (12).

[w] 1 Hawk. P. C. 98. The like obſervation will certainly hold in the caſes of horſeſtealing, (1 Hal. P. C. 531.) thefts in Northumberland and Cumberland, and ſtealing woollen cloth from the tenters; and poſſibly in ſuch other caſes where it is provided by any ſtatute that ſimple larciny, under certain circumſtances, ſhall be felony without benefit of clergy.

[x] *Ff.* 47. 11. 7. Pott. Antiq. l. 1. c. 26.

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breaking and entering a dwelling-houſe, and ſtealing therein property to the value of 40 *s.* the priſoner may be acquitted of the burglary, and be capitally convicted of ſtealing in the dwelling-houſe. *Withal's caſe, Ib.* 83.

(12) It had been held that this ſtatute was only meant to protect perſons, who were obliged to go into public aſſemblies, as churches, courts, and markets, and whoſe perſons thereby became expoſed

OPEN and violent larciny from the *perſon*, or *robbery*, the *rapina* of the civilians, is the felonious and forcible taking, from the perſon of another, of goods or money to any value, by violence or putting him in fear[y]. 1. There muſt be a taking, otherwiſe it is no robbery. A mere attempt to rob was indeed held to be felony, ſo late as Henry the fourth's time[z]: but afterwards it was taken to be only a miſdemeſnor, and puniſhable with fine and impriſonment; till the ſtatute 7 Geo. II. c. 21. which makes it a felony (tranſportable for ſeven years) unlawfully and maliciouſly to aſſault another, with any offenſive weapon or inſtrument;—or by menaces, or by other forcible or violent manner, to demand any money or goods;—with a felonious intent to rob. If the thief, having once taken a purſe, returns it, ſtill it is a robbery; and ſo it is, whether the taking be ſtrictly from the

[y] 1 Hawk. P. C. 95. [z] 1 Hal. P. C. 532.

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expoſed to the attempts of pickpockets, and that it did not apply to perſons who loſt their property when they were aſleep. But this diſtinction has been determined to be unfounded by a deciſion of the judges, and there have ſince been ſeveral capital convictions for ſtealing privately from perſons aſleep. *Willan's caſe, Leach*, 393.

It uſed to be held that no one could be convicted capitally of privately ſtealing from the perſon, if the theft was perceived by any one at the time, as the caſe of privately ſtealing in a ſhop; but the words of the 8 Eliz. c. 4. are the felonious taking from the perſon of another *privily without his knowledge*, the fair conſtruction of which is, that it is capital to ſteal privily without the knowlege of the owner of the property, though the theft may be obſerved at the time by others. And it is now underſtood that this conſtruction is adopted by the judges.

This ſtatute is ſilent reſpecting aiders and abettors, it has therefore been determined that only the principal in the firſt degree, or the hand, who takes the property can be guilty of privately ſtealing from the perſon; if therefore two or more are concerned in the theft, and it cannot be aſcertained, which of them actually took the property, they muſt all be acquitted of this capital part of the charge. *Innis's caſe, Leach*, 7.

perſon of another, or in his preſence only: as, where a robber by menaces and violence puts a man in fear, and drives away his ſheep or his cattle before his face [a]. But if the taking be not either directly from his perſon, or in his preſence, it is no robbery [b]. 2. It is immaterial of what value the thing taken is: a penny as well as a pound, thus forcibly extorted, makes a robbery [c]. 3. Laſtly, the taking muſt be by force, or a previous putting in fear; which makes the violation of the perſon more atrocious than privately ſtealing. For, according to the maxim of the civil law [d], "*qui vi rapuit, fur improbior eſſe videtur.*" This previous violence, or putting in fear, is the criterion that diſtinguiſhes robbery from other larcinies. For if one privately ſteals ſixpence from the perſon of another, and afterwards keeps it by putting him in fear, this is no robbery, for the fear is ſubſequent [e]: neither is it capital, as privately ſtealing, being under the value of twelvepence. Not that it is indeed neceſſary, though uſual, to lay in the indictment that the robbery was committed by *putting in fear*; it is ſufficient, if laid to be done by *violence* [f]. And when it is laid to be done by putting in fear, this does not imply any great
[244] degree of terror or affright in the party robbed: it is enough that ſo much force, or threatening by word or geſture, be uſed, as might create an apprehenſion of danger, or induce a man to part with his property without or againſt his conſent [g] (13). Thus, if a man be knocked down without pre-

[a] 1 Hal. P. C. 533.
[b] Comyns. 478 Stra. 1015.
[c] 1 Hawk. P. C. 97.
[d] *Ff.* 4. 2. 14. § 12.
[e] 1 Hal. P. C. 534.
[f] Trin. 3 Ann. by all the judges.
[g] Foſt. 128.

(13) Mr. J. Aſhhurſt is reported to have thus expreſſed himſelf in delivering the opinion of the judges in Willan's caſe, *Leach*, 232. "The true definition of robbery is the ſtealing, or taking from "the perſon, or in the preſence of another, property of any "amount, with ſuch a degree of *force* or *terror*, as to induce the "party *unwillingly* to part with his property; and whether the "terror ariſes from real or expected violence to the perſon, "or

vious warning, and ſtripped of his property while ſenſeleſs, though ſtrictly he cannot be ſaid to be *put in fear*, yet this is undoubtedly a robbery. Or, if a perſon with a ſword drawn begs an alms, and I give it him through miſtruſt and apprehenſion of violence, this is a felonious robbery[h]. So if, under a pretence of ſale, a man forcibly extorts money from another, neither ſhall this ſubterfuge avail him. But it is doubted[i], whether the forcing a higler, or other chapman, to ſell his wares, and giving him the full value of them, amounts to ſo heinous a crime as robbery (14).

THIS ſpecies of larciny is debarred of the benefit of clergy by ſtatute 23 Hen. VIII. c. 1. and other ſubſequent ſtatutes; not indeed in general, but only when committed in a dwelling-houſe, or in or near the king's highway. A robbery therefore in a diſtant field, or foot-path, was not puniſhed with death[k]; but was open to the benefit of clergy, till the

[h] 1 Hawk. P. C. 96. [i] *Ibid.* 97. [k] 1 Hal. P. C. 535.

" or from a ſenſe of injury to the character, the law makes no " kind of difference; for to moſt men the idea of loſing their fame " and reputation is equally, if not more terrific than the dread of " perſonal injury. The principal ingredient in robbery is a man's " being *forced* to part with his property; and the judges are " unanimouſly of opinion, that upon the principles of law, and " the authority of former deciſions, a *threat* to accuſe a man of " having committed the greateſt of all crimes, is a ſufficient force " to conſtitute the crime of robbery by putting in fear."

(14) This diſtinction has been frequently admitted by the judges in proſecutions for robbery, *viz.* that if any thing is ſnatched ſuddenly from the head, hand, or perſon of any one without any ſtruggle on the part of the owner, or without any evidence of force or violence being exerted by the thief, it does not amount to robbery. But if any thing is broken or torn in conſequence of the ſudden ſeizure, it would be evidence of ſuch force as would conſtitute a robbery; as where part of a lady's hair was torn away by ſnatching a diamond pin from her head, and an ear was torn by pulling off an ear-ring, each of theſe caſes was determined to be a robbery. *Leach*, 238.

ſtatute 3 & 4 W. & M. c. 9. which takes away clergy from both principals and acceſſories before the fact, in robbery, whereſoever committed.

II. MALICIOUS *miſchief*, or damage, is the next ſpecies of injury to private property, which the law conſiders as a public crime. This is ſuch as is done, not *animo furandi*, or with an intent of gaining by another's loſs; which is ſome, though a weak, excuſe: but either out of a ſpirit of wanton cruelty, or black and diabolical revenge. In which it bears a near relation to the crime of arſon; for as that affects the habitation, ſo this does the other property, of individuals. And therefore any damage ariſing from this miſchievous diſpoſition, though only a treſpaſs at common law, is now by
[245] a multitude of ſtatutes made penal in the higheſt degree. Of theſe I ſhall extract the contents in order of time.

AND, firſt, by ſtatute 22 Hen. VIII. c. 11. perverſely and maliciouſly to cut down or deſtroy the powdike, in the fens of Norfolk and Ely, is felony. And in like manner it is by many ſpecial ſtatutes, enacted upon the occaſions, made felony to deſtroy the ſeveral ſea-banks, river-banks, public navigations, and bridges, erected by virtue of thoſe acts of parliament. By ſtatute 43 Eliz. c. 13. (for preventing rapine on the northern borders) to burn any barn or ſtack of corn or grain; or to impriſon or carry away any ſubject, in order to ranſom him, or to make prey or ſpoil of his perſon or goods upon deadly feud or otherwiſe, in the four northern counties of Northumberland, Weſtmorland, Cumberland, and Durham, or being acceſſory before the fact to ſuch carrying away or impriſonment; or to give or take any money or contribution, there called *blackmail*, to ſecure ſuch goods from rapine; is felony without benefit of clergy. By ſtatute 22 & 23 Car. II. c. 7. maliciouſly, unlawfully, and willingly, in the night time, to burn or cauſe to be burnt or deſtroyed, any ricks or ſtacks of corn, hay, or grain, barns, houſes, buildings, or kilns; or to kill any horſes, ſheep, or other cattle, is felony; but the offender may make his election to

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be tranſported for ſeven years; and to maim or hurt ſuch horſes, ſheep, or other cattle, is a treſpaſs, for which treble damages ſhall be recovered. By ſtatute 4 & 5 W. & M. c. 23. to burn on any waſte, between Candlemas and Midſummer, any grig, ling, heath, furze, goſs, or fern, is puniſhable with whipping and confinement in the houſe of correction. By ſtatute 1 Ann. ſt. 2. c. 9. captains and mariners belonging to ſhips, and deſtroying the ſame, to the prejudice of the owners, (and by 4 Geo. I. c. 12. to the prejudice of inſurers alſo,) are guilty of felony without benefit of clergy. And by ſtatute 12 Ann. ſt. 2. c. 18. making any hole in a ſhip in diſtreſs, or ſtealing her pumps, or aiding or abetting ſuch offence, or wilfully doing any thing tending to the immediate loſs of ſuch ſhip, is felony without benefit of clergy. By ſtatute 1 Geo. I. c. 48. maliciouſly to ſet on fire any underwood, wood, or coppice, is made ſingle felony. By [246] ſtatute 6 Geo. I. c. 23. the wilful and malicious tearing, cutting, ſpoiling, burning, or defacing of the garments or cloaths of any perſon paſſing in the ſtreets or highways, with intent ſo to do, is felony. This was occaſioned by the inſolence of certain weavers and others: who, upon the introduction of ſome Indian faſhions prejudicial to their own manufactures, made it their practice to deface them; either by open outrage, or by privily cutting, or caſting *aqua fortis* in the ſtreets upon ſuch as wore them. By ſtatute 9 Geo. I. c. 22. commonly called the Waltham black-act, occaſioned by the devaſtations committed near Waltham in Hampſhire, by perſons in diſguiſe or with their faces blacked; (who ſeem to have reſembled the Roberdſmen, or followers of Robert Hood, that in the reign of Richard the firſt committed great outrages on the borders of England and Scotland [l];) by this black act, I ſay, which has in part been mentioned under the ſeveral heads of riots, menaces, mayhem, and larciny [m], it is farther enacted, that to ſet fire to any houſe, barn, or outhouſe, (which is extended by ſtatute 9 Geo. III. c. 29. to the malicious and wilful burning or ſetting fire to all kinds of

[l] 3 Inſt. 197. [m] See pag. 144. 208. 235. 240.

mills,) or to any hovel, cock, mow, or ſtack of corn, ſtraw, hay, or wood (15); or unlawfully and maliciouſly to break down the head of any fiſhpond, whereby the fiſh ſhall be loſt or deſtroyed; or in like manner to kill, maim, or wound any cattle (16); or cut down or deſtroy, any trees planted in an avenue, or growing in a garden, orchard, or plantation, for ornament, ſhelter, or profit; all theſe malicious acts, or procuring by gift or promiſe of reward any perſon to join them therein, are felonious without benefit of clergy: and the hundred ſhall be chargeable for the damages, unleſs the offender be convicted. In like manner by the Roman law, to cut down trees, and eſpecially vines, was puniſhed in the ſame degree as robbery [n]. By ſtatutes 6 Geo. II. c. 37. and 10 Geo. II. c. 32. it is alſo made felony without the benefit of clergy, maliciouſly to cut down any river or ſea-bank, whereby lands may be overflowed or damaged; or
[247] to cut any hop binds growing in a plantation of hops, or wilfully and maliciouſly to ſet on fire, or cauſe to be ſet on fire, any mine, pit, or delph of coal. By ſtatute 11 Geo. II. c. 22. to uſe any violence in order to deter any perſon from buying corn or grain; to ſeize any carriage or horſe carrying grain or meal to or from any market or ſea-port; or to uſe any outrage with ſuch intent; or to ſcatter, take away, ſpoil, or damage ſuch grain or meal; is puniſhed for the firſt offence with impriſonment and public

[n] *Ff.* 47. 7. 2.

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(15) As the ſetting fire to property of this kind, where a houſe or out-houſe was not burned, was not felony by the common law, it has been held that ſetting fire to *a parcel* of unthreſhed wheat is not a felony, being not within the deſcription of any articles ſpecified in the ſtatute. *Judd's caſe, Leach*, 381.

(16) It has frequently been determined, that to conſtitute a felony within the meaning of the ſtatute, the killing or maiming muſt proceed from malice or revenge to the owner of the animal; and it is not ſufficient if it is only the effect of a brutal diſpoſition, or of a ſudden paſſion conceived againſt the beaſt itſelf. *Shepherd's caſe, Leach*, 436.

whipping: and the ſecond offence, or deſtroying any granary where corn is kept for exportation, or taking away or ſpoiling any grain or meal in ſuch granary, or in any ſhip, boat, or veſſel intended for exportation, is felony, ſubject to tranſportation for ſeven years. By ſtatute 28 Geo. II. c. 19. to ſet fire to any goſs, furze, or fern, growing in any foreſt or chaſe, is ſubject to a fine of five pounds. By ſtatutes 6 Geo. III. c. 36 and 48. and 13 Geo. III. c. 33. wilfully to ſpoil or deſtroy any timber or other trees, roots, ſhrubs, or plants, is for the two firſt offences liable to pecuniary penalties; and for the third, if in the day time, and even for the firſt if at night, the offender ſhall be guilty of felony, and liable to tranſportation for ſeven years. By ſtatute 9 Geo. III. c. 29. wilfully and maliciouſly to burn or deſtroy any engine or other machines, therein ſpecified, belonging to any mine; or any fences for incloſures purſuant to any act of parliament, is made ſingle felony, and puniſhable with tranſportation for ſeven years, in the offender, his adviſers, and procurers. And by ſtatute 13 Geo. III. c. 38. the like puniſhment is inflicted on ſuch as break into any houſe, &c. belonging to the plate-glaſs company with intent to ſteal, cut, or deſtroy, any of their ſtock or utenſils, or ſhall wilfully and maliciouſly cut or deſtroy the ſame. And theſe are the principal puniſhments of malicious miſchief (17).

III. FORGERY, or the *crimen falſi*, is an offence, which was puniſhed by the civil law with deportation or baniſhment, and ſometimes with death [o]. It may with us be defined (at common law) to be, "the fraudulent making or "alteration of a writing to the prejudice of another man's

[o] *Inſt.* 4. 18. 7.

(17) And by ſtatute 22 Geo. III. c. 40. if any perſon ſhall break into any houſe or ſhop with intent to cut or deſtroy any ſerge, woollen, velvet, ſilk, linen or cotton goods, in the loom, or any ſtock or utenſils uſed in manufacturing ſuch goods, he ſhall be guilty of felony without benefit of clergy.

"right:"

"right:" for which the offender may ſuffer fine, impriſonment, and pillory. And alſo, by a variety of ſtatutes, a more ſevere puniſhment is inflicted on the offender in many particular caſes, which are ſo multiplied of late as almoſt to become general. I ſhall mention the principal inſtances.

BY ſtatute 5 Eliz. c. 14. to forge or make, or knowingly to publiſh or give in evidence, any forged deed, court roll, or will, with intent to affect the right of real property, either freehold or copyhold, is puniſhed by forfeiture to the party grieved of double coſts and damages; by ſtanding in the pillory, and having both his ears cut off, and his noſtrils ſlit, and ſeared; by forfeiture to the crown of the profits of his lands, and by perpetual impriſonment. For any forgery relating to a term of years, or annuity, bond, obligation, acquittance, releaſe, or diſcharge of any debt or demand of any perſonal chattels, the ſame forfeiture is given to the party grieved; and on the offender is inflicted the pillory, loſs of one of his ears, and a year's impriſonment: the ſecond offence in both caſes being felony without benefit of clergy.

BESIDES this general act, a multitude of others, ſince the revolution, (when paper credit was firſt eſtabliſhed,) have inflicted capital puniſhment on the forging, altering, or uttering as true, when forged, of any bank bills or notes, or other ſecurities [p]: of bills of credit iſſued from the exchequer [q]; of ſouth ſea bonds, &c. [r]; of lottery tickets or orders [s]; of army or navy debentures [t]; of Eaſt India bonds [u]; of writings under ſeal of the London, or royal exchange aſſurance [w]; of the hand of the receiver of the pre-fines [x]; or of the accountant-general and certain other officers of the court of chancery [y]; of a letter of attorney or other power to receive or transfer ſtock or annuities; and on the per-

[p] Stat. 8 & 9 W. III. c. 20. § 36. 11 Geo. I. c. 9. 12 Geo. I. c. 32. 15 Geo. II. c. 13. 13 Geo. III. c. 79.
[q] See the ſeveral acts for iſſuing them.
[r] Stat. 9 Ann. c. 21. 6 Geo. I. c. 4 & 11. 12 Geo. I. c. 32.
[s] See the ſeveral acts for the lotteries.
[t] Stat. 5 Geo. I. c. 14. 9 Geo. I. c. 5.
[u] Stat. 12 Geo. I. c. 32.
[w] Stat. 6 Geo. I. c. 18.
[x] Stat. 32 Geo. II. c. 14.
[y] Stat. 12 Geo. I. c. 32.

ſonating a proprietor thereof, to receive or transfer ſuch annuities, ſtock, or dividends [e]: alſo on the perſonating, or procuring to be perſonated, any ſeaman or other perſon, entitled to wages or other naval emoluments, or any of his perſonal repreſentatives; and the taking, or procuring to be taken, any falſe oath in order to obtain a probate, or letters of adminiſtration, in order to receive ſuch payments; and the forging, or procuring to be forged, and likewiſe the uttering, or publiſhing, as true, of any counterfeited ſeaman's will or power [a]: to which may be added, though not ſtrictly reducible to this head, the counterfeiting of mediterranean paſſes, under the hands of the lords of the admiralty, to protect one from the piratical ſtates of Barbary [b]; the forging or imitating of any ſtamps to defraud the public revenue [c]; and the forging of any marriage regiſter or licence [d]: all which are by diſtinct acts of parliament made felonies without benefit of clergy. By ſtatutes 13 Geo. III. c. 52 & 59. forging or counterfeiting any ſtamp or mark to denote the ſtandard of gold and ſilver plate, and certain other offences of the like tendency, are puniſhed with tranſportation for fourteen years (18). By ſtatute 12 Geo. III. c. 48. certain frauds on the ſtamp-duties, therein deſcribed, principally by uſing the ſame ſtamps more than once, are made ſingle felony, and liable to tranſportation for ſeven years. And the ſame puniſhment is inflicted by ſtatute 13 Geo. III. c. 38. on ſuch as counterfeit the common ſeal of the corporation for manufacturing plate-glaſs, (thereby erected,) or knowingly demand money of the company by virtue of any writing under ſuch counterfeit ſeal (19).

[e] Stat. 8 Geo. I. c. 22. 9 Geo. I. c. 12. 31 Geo. II. c. 22. § 77.
[a] Stat. 31 Geo. II. c. 10. 9 Geo. III. c. 30.
[b] Stat. 4 Geo. II. c. 18.
[c] See the ſeveral ſtamp acts.
[d] Stat. 26 Geo. II. c. 33.

(18) And by 24 Geo. III. ſeſſ. 2. c. 53. ſuch offences are made capital felonies.

(19) And by 24 Geo. III. ſeſſ. 2. c. 37. to forge the ſuperſcription of any letter in order to avoid the payment of the poſtage, is a felony puniſhed by tranſportation for ſeven years.

THERE

THERE are alſo certain other general laws, with regard to forgery; of which the firſt is 2 Geo. II. c. 25. whereby the firſt offence is forging or procuring to be forged, acting or aſſiſting therein, or uttering or publiſhing as true any forged deed, will, bond, writing obligatory, bill of exchange, promiſſory
[250] note, indorſement or aſſignment thereof, or any acquittance or receipt for money or goods, with intention to defraud any perſon, (or corporation [e],) is made felony without benefit of clergy. And by ſtatute 7 Geo. II. c. 22. and 18 Geo. III. c. 18. it is equally penal to forge or cauſe to be forged or utter as true a counterfeit acceptance of a bill of exchange, or the number or principal ſum of any accountable receipt for any note, bill, or any other ſecurity for money; or any warrant or order for the payment of money, or delivery of goods (20). So that, I believe, through the number of theſe general and ſpecial proviſions, there is now hardly a caſe poſſible to be conceived, wherein forgery, that tends to defraud, whether in the name of a real or fictitious perſon [f], is not made a capital crime (21).

[e] Stat. 31 Geo. II. c. 22. § 78. [f] Foſt. 116, &c.

(20) The judges have decided that an order to a ſhopkeeper in a forged name to deliver goods to the bearer is not a forgery within the ſtatute; but a warrant or order within the ſtatute 7 Geo. II. c. 22. muſt import that the perſon giving ſuch warrant or order has, or at leaſt claims, an intereſt in the money or goods, which are the ſubject-matter of that warrant or order, that he has or at leaſt aſſumes a diſpoſing power over ſuch money or goods, and takes upon himſelf to transfer the property, or cuſtody of them to the perſon in whoſe favour ſuch warrant or order is made. *Mitchell's caſe*, *Foſt.* 120. And it muſt be directed to the perſon, who has the cuſtody of the goods. *Clench's caſe*, *Leach*, 437. But a draft upon a banker in the name of a perſon who kept no caſh at the banker's ſhop, is a forgery within the ſtatute, as it aſſumes that there was caſh kept at the houſe, which the drawer had authority to diſpoſe of. *Locket's caſe*, *Ibid.* 89.

(21) It has frequently been determined that drawing, indorſing or accepting a bill of exchange in a fictitious name is a forgery.

Bolland's

THESE are the principal infringements of the rights of property: which were the laſt ſpecies of offences againſt individuals or private ſubjects, which the method of our diſtribution has led us to conſider. We have before examined the nature of all offences againſt the public, or commonwealth; againſt the king or ſupreme magiſtrate, the father and protector of that community; againſt the univerſal law of all civilized nations; together with ſome of the more atrocious offences, of publicly pernicious conſequences, againſt God and his holy religion. And theſe ſeveral heads comprehend the whole circle of crimes and miſdemeſnors, with the puniſhment annexed to each, that are cognizable by the laws of England.

Bolland's caſe, &c. *Leach*, 78. 159. 192. It is alſo forgery to fabricate a will by counterfeiting the name of a pretended teſtator, who is ſtill living. *Cogan's caſe*, *Ibid.* 355.

If a perſon puts his own name to an inſtrument, repreſenting himſelf to be a different perſon of that name with an intent to defraud, he is guilty of forgery. 4 *T. R.* 28.

A bill of exchange may be produced in evidence againſt a priſoner proſecuted for the forgery of it, and he may be convicted upon the uſual evidence of the forgery, though it has never been ſtamped purſuant to the ſtamp acts. *Hawkeſwood's caſe*, *Ibid.* 221.

CHAPTER THE EIGHTEENTH.

OF THE MEANS OF PREVENTING OFFENCES.

WE are now arrived at the fifth general branch, or head, under which I propoſed to conſider the ſubject of this book of our commentaries; *viz.* the means of *preventing* the commiſſion of crimes and miſdemeſnors. And really it is an honour, and almoſt a ſingular one, to our Engliſh laws, that they furniſh a title of this ſort: ſince *preventive* juſtice is upon every principle of reaſon, of humanity, and of ſound policy, preferable in all reſpects to *puniſhing* juſtice [a]; the execution of which, though neceſſary, and in it's conſequences a ſpecies of mercy to the commonwealth, is always attended with many harſh and diſagreeable circumſtances.

THIS preventive juſtice conſiſts in obliging thoſe perſons, whom there is a probable ground to ſuſpect of future miſbehaviour, to ſtipulate with and to give full aſſurance to the public, that ſuch offence as is apprehended ſhall not happen; by finding pledges or ſecurities for keeping the peace, or for their good behaviour. This requiſition of ſureties has been ſeveral times mentioned before, as part of the penalty inflicted upon ſuch as have been guilty of certain groſs miſdemeſnors: but there alſo it muſt be underſtood rather as a caution againſt the repetition of the offence, than any immediate pain or puniſhment. And indeed, if we conſider all human
[252] puniſhments in a large and extended view, we ſhall find them all rather calculated to prevent future crimes, than to

[a] Beccar. ch. 41.

expiate

expiate the paſt: ſince, as was obſerved in a former chapter [b], all puniſhments inflicted by temporal laws may be claſſed under three heads; ſuch as to tend to the amendment of the offender himſelf, or to deprive him of any power to do future miſchief, or to deter others by his example: all of which conduce to one and the ſame end, of preventing future crimes, whether that be effected by amendment, diſability, or example. But the caution, which we ſpeak of at preſent, is ſuch as is intended merely for prevention, without any crime actually committed by the party, but ariſing only from a probable ſuſpicion, that ſome crime is intended or likely to happen; and conſequently it is not meant as any degree of puniſhment, unleſs perhaps for a man's imprudence in giving juſt ground of apprehenſion.

By the Saxon conſtitution theſe ſureties were always at hand, by means of king Alfred's wiſe inſtitution of decennaries or frankpledges; wherein, as has more than once been obſerved [c], the whole neighbourhood or tithing of freemen were mutually pledges for each other's good behaviour. But this great and general ſecurity being now fallen into diſuſe and neglected, there hath ſucceeded to it the method of making ſuſpected perſons find particular and ſpecial ſecurities for their future conduct: of which we find mention in the laws of king Edward the confeſſor [d]; "*tradat fidejuſſores* "*de pace et legalitate tuenda.*" Let us therefore conſider, firſt, what this ſecurity is; next, who may take or demand it; and laſtly, how it may be diſcharged.

1. THIS ſecurity conſiſts in being bound, with one or more ſureties, in a recognizance or obligation to the king, entered on record, and taken in ſome court or by ſome judicial officer; whereby the parties acknowlege themſelves to be indebted to the crown in the ſum required, (for inſtance 100*l.*) with condition to be void and of none effect, if the party ſhall appear in court on ſuch a day, and in the mean time ſhall keep the peace; either generally, towards the king, [253]

[b] See pag. 11. [c] See Vol. I. pag 114. [d] *cap.* 18.

and

and all his liege people; or particularly alſo, with regard to the perſon who craves the ſecurity. Or, if it be for the good behaviour, then on condition that he ſhall demean and behave himſelf well, (or be of good behaviour,) either generally or ſpecially, for the time therein limited, as for one or more years, or for life. This recognizance, if taken by a juſtice of the peace, muſt be certified to the next ſeſſions, in purſuance of the ſtatute 3 Hen. VII. c. 1. and if the condition of ſuch recognizance be broken, by any breach of the peace in the one caſe, or any miſbehaviour in the other, the recognizance becomes forfeited or abſolute; and being *eſtreated* or extracted (taken out from among the other records) and ſent up to the exchequer, the party and his ſureties having now become the king's abſolute debtors, are ſued for the ſeveral ſums in which they are reſpectively bound.

2. ANY juſtices of the peace, by virtue of their commiſſion, or thoſe who are *ex officio* conſervators of the peace, as was mentioned in a former volume[e], may demand ſuch ſecurity according to their own diſcretion; or it may be granted at the requeſt of any ſubject, upon due cauſe ſhewn, provided ſuch demandant be under the king's protection; for which reaſon it has been formerly doubted, whether jews, pagans, or perſons convicted of a *praemunire*, were entitled thereto[f]. Or, if the juſtice is averſe to act, it may be granted by a mandatory writ, called a *ſupplicavit*, iſſuing out of the court of king's bench or chancery; which will compel the juſtice to act, as a miniſterial and not as a judicial officer: and he muſt make a return to ſuch writ, ſpecifying his compliance, under his hand and ſeal[g]. But this writ is ſeldom uſed: for, when application is made to the ſuperior courts, they uſually take the recognizances there, under the directions of the ſtatute 21 Jac. I. c. 8. And indeed a peer or peereſs cannot be bound over in any other place, than the courts of
[254] king's bench or chancery: though a juſtice of the peace has a power to require ſureties of any other perſon, being *compos*

[e] See Vol. I. pag. 350.
[f] 1 Hawk. P. C. 126.
[g] F. N. B. 80. 2 P. Wms. 102.

mentis

mentis and under the degree of nobility, whether he be a fellow juſtice or other magiſtrate, or whether he be merely a private man [h]. Wives may demand it againſt their huſbands: or huſbands, if neceſſary, againſt their wives [i]. But feme coverts, and infants under age, ought to find ſecurity by their friends only, and not to be bound themſelves; for they are incapable of engaging themſelves to anſwer any debt; which, as we obſerved, is the nature of theſe recognizances or acknowlegements.

3. A RECOGNIZANCE may be diſcharged, either by the demiſe of the king, to whom the recognizance is made; or by the death of the principal party bound thereby, if not before forfeited; or by order of the court to which ſuch recognizance is certified by the juſtices, (as the quarter ſeſſions, aſſiſes, or king's bench,) if they ſee ſufficient cauſe: or in caſe he at whoſe requeſt it was granted, if granted upon a private account, will releaſe it, or does not make his appearance to pray that it may be continued [j].

THUS far what has been ſaid is applicable to both ſpecies of recognizances, for the *peace*, and for the *good behaviour*; *de pace, et legalitate, tuenda*, as expreſſed in the laws of king Edward. But as theſe two ſpecies of ſecurities are in ſome reſpects different, eſpecially as to the cauſe of granting, or the means of forfeiting them, I ſhall now conſider them ſeparately: and firſt, ſhall ſhew for what cauſe ſuch a recognizance, with ſureties for the *peace*, is grantable; and then, how it may be forfeited.

1. ANY juſtiee of the peace may, *ex officio*, bind all thoſe to keep the peace, who in his preſence make any affray; or threaten to kill or beat another: or contend together with hot and angry words; or go about with unuſual weapons or attendance, to the terror of the people; and all ſuch as [255] he knows to be common barretors; and ſuch as are brought before him by the conſtable for a breach of the peace in his

[h] 1 Hawk. P. C. 127.
[i] 2 Stra. 1207.
[j] 1 Hawk. P. C. 129.

preſence:

preſence: and alſo ſuch perſons, as, having been before bound to the peace, have broken it and forfeited their recognizances[k]. Alſo, wherever any private man hath juſt cauſe to fear, that another will burn his houſe, or do him a corporal injury, by killing, impriſoning, or beating him: or that he will procure others ſo to do: he may demand ſurety of the peace againſt ſuch perſon: and every juſtice of the peace is bound to grant it, if he who demands it will make oath, that he is actually under fear of death or bodily harm; and will ſhew that he has juſt cauſe to be ſo, by reaſon of the other's menaces, attempts, or having lain in wait for him; and will alſo farther ſwear, that he does not require ſuch ſurety out of malice or for mere vexation[l]. This is called *ſwearing the peace* againſt another: and, if the party does not find ſuch ſureties, as the juſtice in his diſcretion ſhall require, he may immediately be committed till he does[m].

2. Such recognizance for keeping the peace, when given, may be forfeited by any actual violence, or even an aſſault, or menace, to the perſon of him who demanded it, if it be a ſpecial recognizance: or, if the recognizance be general, by any unlawful action whatſoever, that either is or tends to a breach of the peace; or, more particularly, by any one of the many ſpecies of offences which were mentioned as crimes againſt the public peace in the eleventh chapter of this book: or, by any private violence committed againſt any of his majeſty's ſubjects. But a bare treſpaſs upon the lands or goods of another, which is a ground for a civil action, unleſs accompanied with a wilful breach of the peace, is no forfeiture of the recognizance[n]. Neither are mere reproachful words, as calling a man knave or liar, any breach of the peace, ſo as to forfeit one's recognizance, (being looked upon to be merely the effect of unmeaning heat and paſſion,) unleſs they amount to a challenge to fight[o].

[256]

The other ſpecies of recognizance, with ſureties, is for the *good abearance*, or *good behaviour*. This includes ſecurity

[k] 1 Hawk. P. C. 126.
[l] *Ibid.* 127.
[m] *Ibid.* 128.
[n] *Ibid.* 131.
[o] *Ibid.* 130.

for

for the peace, and ſomewhat more: we will therefore examine it in the ſame manner as the other.

1. FIRST, then, the juſtices are empowered by the ſtatute 34 Edw. III. c. 1. to bind over to the good behaviour towards the king and his people, all them *that be not of good fame*, wherever they be found; to the intent that the people be not troubled nor endamaged, nor the peace diminiſhed, nor merchants and others, paſſing by the highways of the realm, be diſturbed nor put in the peril which may happen by ſuch offenders. Under the general words of this expreſſion, *that be not of good fame*, it is holden that a man may be bound to his good behaviour for cauſes of ſcandal, *contra bonos mores*, as well as *contra pacem*; as, for haunting bawdy-houſes with women of bad fame; or for keeping ſuch women in his own houſe; or for words tending to ſcandalize the government, or in abuſe of the officers of juſtice, eſpecially in the execution of their office. Thus alſo a juſtice may bind over all night-walkers; eaves-droppers; ſuch as keep ſuſpicious company, or are reported to be pilferers or robbers; ſuch as ſleep in the day, and wake in the night; common drunkards; whoremaſters; the putative fathers of baſtards; cheats; idle vagabonds; and other perſons, whoſe miſbehaviour may reaſonably bring them within the general words of the ſtatute, as perſons not of good fame: an expreſſion, it muſt be owned, of ſo great a latitude, as leaves much to be determined by the diſcretion of the magiſtrate himſelf. But, if he commits a man for want of ſureties, he muſt expreſs the cauſe thereof with convenient certainty; and take care that ſuch cauſe be a good one [p].

2. A RECOGNIZANCE for the good behaviour may be forfeited by all the ſame means, as one for the ſecurity of the peace may be; and alſo by ſome others. As, by going armed with unuſual attendance, to the terror of the people; by ſpeaking words tending to ſedition; or by committing any of thoſe acts of miſbehaviour, which the recognizance was [257]

[p] 1 Hawk. P. C. 132.

intended to prevent. But not by barely giving freſh cauſe of ſuſpicion of that which perhaps may never actually happen[q]: for, though it is juſt to compel ſuſpected perſons to give ſecurity to the public againſt miſbehaviour that is apprehended; yet it would be hard, upon ſuch ſuſpicion, without the proof of any actual crime, to puniſh them by a forfeiture of their recognizance.

[q] 1 Hawk. P. C. 133.

CHAPTER THE NINETEENTH.

OF COURTS OF A CRIMINAL JURISDICTION.

THE ſixth, and laſt, object of our inquiries will be the method of *inflicting* thoſe *puniſhments*, which the law has annexed to particular offences; and which I have conſtantly ſubjoined to the deſcription of the crime itſelf. In the diſcuſſion of which I ſhall purſue much the ſame general method that I followed in the preceding book, with regard to the redreſs of civil injuries: by, firſt, pointing out the ſeveral *courts* of criminal juriſdiction, wherein offenders may be proſecuted to puniſhment; and by, ſecondly, deducing down, in their natural order, and explaining, the ſeveral *proceedings* therein.

FIRST, then, in reckoning up the ſeveral *courts* of criminal juriſdiction, I ſhall, as in the former caſe, begin with an account of ſuch, as are of a *public* and *general* juriſdiction throughout the whole realm; and, afterwards, proceed to ſuch, as are only of a *private* and *ſpecial* juriſdiction, and confined to ſome particular parts of the kingdom.

I. IN our inquiries into the criminal courts of *public* and *general* juriſdiction, I muſt in one reſpect purſue a different order from that in which I conſidered the civil tribunals. For there, as the ſeveral courts had a gradual ſubordination to each other, the ſuperior correcting and reforming the errors of the inferior, I thought it beſt to begin with the loweſt, and ſo aſcend gradually to the courts of appeal, or thoſe of

the moſt extenſive powers. But as it is contrary to the genius and ſpirit of the law of England, to ſuffer any man to be tried twice for the ſame offence in a criminal way, eſpecially if acquitted upon the firſt trial; therefore theſe criminal courts may be ſaid to be all independent of each other: at leaſt ſo far, as that the ſentence of the loweſt of them can never be controlled or reverſed by the higheſt juriſdiction in the kingdom, unleſs for error in matter of law, apparent upon the face of the record; though ſometimes cauſes may be removed from one to the other before trial. And therefore as, in theſe courts of criminal cognizance, there is not the ſame chain and dependence as in the others, I ſhall rank them according to their dignity, and begin with the higheſt of all; *viz.*

1. THE high court of *parliament*: which is the ſupreme court in the kingdom, not only for the making, but alſo for the execution, of laws; by the trial of great and enormous offenders, whether lords or commoners, in the method of parliamentary impeachment. As for acts of parliament to attaint particular perſons of treaſon or felony, or to inflict pains and penalties, beyond or contrary to the common law, to ſerve a ſpecial purpoſe, I ſpeak not of them; being to all intents and purpoſes new laws, made *pro re nata*, and by no means an execution of ſuch as are already in being. But an impeachment before the lords by the commons of Great Britain, in parliament, is a proſecution of the already known and eſtabliſhed law, and has been frequently put in practice; being a preſentment to the moſt high and ſupreme court of criminal juriſdiction by the moſt ſolemn grand inqueſt of the whole kingdom[a]. A commoner cannot however be impeached before the lords for any capital offence, but only for high miſdemeſnors[b]: a peer may be impeached for any

[a] 1 Hal. P. C. 150.

[b] When, in 4 Edw. III. the king demanded the earls, barons, and peers, to give judgment againſt Simon de Bereford, who had been a notorious accomplice in the treaſons of Roger earl of Mortimer, they came before the king in parliament, and ſaid all with one voice, that the ſaid Simon was not their peer; and therefore they were not bound to judge

crime (1). And they uſually (in caſe of an impeachment of a peer for treaſon) addreſs the crown to appoint a lord high ſteward, for the greater dignity and regularity of their proceedings; which high ſteward was formerly elected by the peers themſelves, though he was generally commiſſioned by

Judge him as a peer of the land. And when afterwards, in the ſame parliament, they were prevailed upon, in reſpect of the notoriety and heinouſneſs of his crimes, to receive the charge and to give judgment againſt him, the following proteſt and proviſo was entered in the parliament-roll. "And it is aſſented "and accorded by our lord the king, "and all the great men, in full parliament, that albeit the peers, as judges "of the parliament, have taken upon "them in the preſence of our lord the "king to make and render the ſaid judgment; yet the peers who now are, or "ſhall be in time to come, be not bound "or charged to render judgment upon "others than peers; nor that the peers "of the land have power to do this, but "thereof ought ever to be diſcharged "and acquitted; and that the aforeſaid "judgment now rendered be not drawn "to example or conſequence in time to "come, whereby the ſaid peers may be "charged hereafter to judge others than "their peers, contrary to the laws of the "land, if the like caſe happen, which "God forbid." (*Rot. Parl.* 4 *Edw. III. n.* 2 & 6. 2 Brad. Hiſt. 190. Selden. judic. in parl. ch. 1.)

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(1) But according to the laſt reſolution of the houſe of lords, a commoner may be impeached for a capital offence.—On the 26th of March 1680, Edward Fizharris a commoner was impeached by the commons of high treaſon. Upon which the attorney general acquainted the peers that he had an order from the king to proſecute Fitzharris by indictment, and a queſtion thereupon was put, whether he ſhould be proceeded againſt according to the courſe of the common law or by way of impeachment, and it was reſolved againſt proceeding in the impeachment. 13 *Lords' Journ.* p. 755. Fitzharris was afterwards proſecuted by indictment, and he pleaded in abatement that there was an impeachment pending againſt him for the ſame offence; but this plea was overruled, and he was convicted and executed. But on the 26th of June 1689, Sir Adam Blair and four other commoners were impeached for high treaſon, in having publiſhed a proclamation of James the ſecond. On the 2d of July a long report of precedents was produced, and a queſtion was put to the judges whether the record 4 Edw. III. N° 6. was a ſtatute. They anſwered, as it appeared to them by the copy, they believed it to be a ſtatute; but if they ſaw the roll itſelf, they could be more poſitive. It was then moved to aſk the judges, but the motion

the king[c]; but it hath of late years been ſtrenuouſly maintained[d], that the appointment of an high ſteward in ſuch caſes is not indiſpenſably neceſſary, but that the houſe may proceed without one. The articles of impeachment are a kind of bills of indictment, found by the houſe of commons, and afterwards tried by the lords; who are in caſes of miſdemeſnors conſidered not only as their own peers, but as the peers of the whole nation. This is a cuſtom derived to us from the conſtitution of the antient Germans; who in their great councils ſometimes tried capital accuſations relating to the public: "*licet apud conſilium accuſare quoque, et diſcrimen capitis intendere*[e]." And it has a peculiar propriety in the Engliſh conſtitution; which has much improved upon the antient model imported hither from the continent. For, though in general the union of the legiſlative and judicial powers ought to be moſt carefully avoided[f], yet it may happen that a ſubject, intruſted with the adminiſtration of public affairs, may infringe the rights of the people, and be guilty of ſuch crimes, as the ordinary magiſtrate either
[261] dares not or cannot puniſh. Of theſe the repreſentatives of the people, or houſe of commons, cannot properly *judge*; becauſe their conſtituents are the parties injured: and can therefore only *impeach*. But before what court ſhall this impeachment be tried? Not before the ordinary tribunals, which would naturally be ſwayed by the authority of ſo powerful an accuſer. Reaſon therefore will ſuggeſt, that this branch of the legiſlature, which repreſents the people,

[c] 1 Hal. P. C. 350.
[d] Lords' Journ. 22 May 1679. Com. Journ. 15 May 1679. Foſt. 142, &c.
[e] Tacit. *de mor. Germ.* 12.
[f] See Vol. I. pag. 269.

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was negatived, whether by this record the lords were barred from trying a commoner for a capital crime upon an impeachment of the commons. And they immediately reſolved to proceed in this impeachment, notwithſtanding the parties were commoners and charged with high treaſon. 14 *Lords' Journ.* p. 260.

But the impeachment was not proſecuted with effect, on account of an intervening diſſolution of the parliament.

muſt

muſt bring it's charge before the other branch, which conſiſts of the nobility, who have neither the ſame intereſts, nor the ſame paſſions as popular aſſemblies [g]. This is a vaſt ſuperiority, which the conſtitution of this iſland enjoys, over thoſe of the Grecian or Roman republics; where the people were at the ſame time both judges and accuſers. It is proper that the nobility ſhould judge, to inſure juſtice to the accuſed; as it is proper that the people ſhould accuſe, to inſure juſtice to the commonwealth. And therefore, among other extraordinary circumſtances attending the authority of this court, there is one of a very ſingular nature, which was inſiſted on by the houſe of commons in the caſe of the earl of Danby in the reign of Charles II. [h]; and it is now enacted by ſtatute 12 & 13 W. III. c. 2. that no pardon under the great ſeal ſhall be pleadable to an impeachment by the commons of Great Britain in parliament [i] (2).

2. THE court of the *lord high ſteward* of Great Britain [k] is a court inſtituted for the trial of peers, indicted for treaſon or felony, or for miſpriſion of either [l]. The office of this great magiſtrate is very antient; and was formerly hereditary, or at leaſt held for life, or *dum bene ſe geſſerit*: but now it is uſually, and hath been for many centuries paſt [m], granted

[g] Monteſq. Sp. L. xi. 6.
[h] Com. Journ. 5 May 1679.
[i] See ch. 31.
[k] 4 Inſt. 58. 2 Hawk. P. C. 5. 421.
[l] Jon. 54.
[l] 1 Bulſtr. 198.
[m] Pryn. on 4 Inſt. 46.

(2) In the impeachment of Warren Haſtings, Eſq. it was confidently advanced, that the lords are not bound to obſerve the ſame rules of evidence in an impeachment, as are admitted in criminal trials in the inferior courts. The high reputation of thoſe, who ſtrenuouſly maintained this doctrine, induced the editor to endeavour to prove, that it was not only contrary to all precedent and authority, but repugnant to the firſt and great principles both of the Engliſh law and conſtitution, in a pamphlet, entitled "A Diſſertation, ſhewing "that the houſe of lords in caſes of judicature are bound by preciſely the ſame rules of evidence, as are obſerved by all other "courts." See more upon impeachments in page 399.

pro hac vice only; and it hath been the conſtant practice (and therefore ſeems now to have become neceſſary) to grant
[262] it to a lord of parliament, elſe he is incapable to try ſuch delinquent peer [n]. When ſuch an indictment is therefore found by a grand jury of freeholders in the king's bench, or at the aſſiſes before the juſtices of *oyer* and *terminer*, it is to be removed by a writ of *certiorari* into the court of the lord high ſteward, which only has power to determine it. A peer may plead a pardon before the court of king's bench, and the judges have power to allow it; in order to prevent the trouble of appointing an high ſteward, merely for the purpoſe of receiving ſuch plea. But he may not plead, in that inferior court, any other plea; as *guilty*, or *not guilty*, of the indictment: but only in this court: becauſe, in conſequence of ſuch plea, it is poſſible that judgment of death might be awarded againſt him. The king therefore, in caſe a peer be indicted for treaſon, felony, or miſpriſion, creates a lord high ſteward *pro hac vice* by commiſſion under the great ſeal; which recites the indictment ſo found, and gives his grace power to receive and try it *ſecundum legem et conſuetudinem Angliae*. Then, when the indictment is regularly removed, by writ of *certiorari*, commanding the inferior court to certify it up to him, the lord high ſteward directs a precept to a ſerjeant at arms, to ſummon the lords to attend and try the indicted peer. This precept was formerly iſſued to ſummon only eighteen or twenty, ſelected from the body of the peers: then the number came to be indefinite; and the cuſtom was, for the lord high ſteward to ſummon as many as he thought proper, (but of late years not leſs than twenty-three [o],) and that thoſe lords only ſhould ſit upon the trial (3): which threw

[n] *Quand un* ſeigneur de parlement *ſerra arrein de treaſon ou felony, le roy par ſes lettres patents fera un grand et ſage* ſeigneur *d'eſtre le grand ſeneſchal d'Angleterre; qui—doit faire un precept——* *pur faire venir xx* ſeigneurs, *un xviii, &c.* (Yearb. 13 *Hen. VIII.* 11.) See Staundf. P. C. 152. 3 Inſt. 28. 4 Inſt. 59. 2 Hawk. P. C. 5. Barr. 234.

[o] Kelynge. 56.

(3) The deciſion is by a majority, but a majority cannot convict, unleſs it conſiſts of twelve or more. See 3 vol. p. 376. n. 20.

a mon-

a monſtrous weight of power into the hands of the crown, and this it's great officer, of ſelecting only ſuch peers as the then predominant party ſhould moſt approve of. And accordingly, when the earl of Clarendon fell into diſgrace with Charles II. there was a deſign formed to prorogue the parliament, in order to try him by a ſelect number of peers: it being doubted whether the whole houſe could be induced to fall in with the views of the court [p]. But now, by ſtatute 7 W. III. c. 3. upon all trials of peers for treaſon or miſpriſion, all the peers who have a right to ſit and vote in parliament ſhall be ſummoned, at leaſt twenty days before ſuch trial, to appear and vote therein; and every lord appearing ſhall vote in the trial of ſuch peer, firſt taking the oaths of allegiance and ſupremacy, and ſubſcribing the declaration againſt popery (4). [263]

During the ſeſſion of parliament the trial of an indicted peer is not properly in the court of the lord high ſteward, but before the court laſt mentioned, of our lord the *king in parliament* [q]. It is true, a lord high ſteward is always appointed in that caſe, to regulate and add weight to the proceedings: but he is rather in the nature of a ſpeaker *pro*

[p] Carte's life of Ormonde. Vol. II. [q] Foſt. 141.

(4) As a peer cannot have the benefit of a challenge like a commoner, (1 *Harg. St. Tr.* 198. 388.) it is ſomewhat ſurpriſing that this manifeſt improvement of the law and conſtitution was not extended to trials of peers for all felonies, in the court of the lord high ſteward. Lord Mountmorres informs us that there are but two inſtances of the trials of peers in Ireland, *viz.* of viſcount Netterville in 1743, and of lord Santry about the ſame time. The firſt was tried in the high court of parliament, the latter in the court of the high ſteward. They were both indicted for murder. Lord Netterville was acquitted, lord Santry was convicted, but pardoned as to his life. Upon lord Santry's trial all the peers were ſummoned, though the regulation of 7 W. III. was not introduced into Ireland till the year 1773. *Lord Mountm.* 2 vol. 197. Murder is high treaſon by the law of Ireland.

tempore,

tempore, or chairman of the court, than the judge of it; for the collective body of the peers are therein the judges both of law and fact, and the high steward has a vote with the rest, in right of his peerage. But in the court of the lord high steward, which is held in the recess of parliament, he is the sole judge of matters of law, as the lords triors are in matters of fact; and as they may not interfere with him in regulating the proceedings of the court, so he has no right to intermix with them in giving any vote upon the trial[r]. Therefore, upon the conviction and attainder of a peer for murder in full parliament, it hath been holden by the judges[s], that in case the day appointed in the judgment for execution should lapse before execution done, a new time of execution may be appointed by either the high court of parliament, during it's sitting, though no high steward be existing; or, in the recess of parliament, by the court of king's bench, the record being removed into that court.

[264] IT has been a point of some controversy, whether the bishops have now a right to sit in the court of the lord high steward, to try indictments of treason and misprision. Some incline to imagine them included under the general words of the statute of king William, "all peers, who have a right "to sit and vote in parliament:" but the expression had been much clearer, if it had been, "all *lords*;" and not, "all "*peers*;" for though bishops, on account of the baronies annexed to their bishopricks, are clearly lords of parliament, yet, their blood not being ennobled, they are not universally allowed to be peers with the temporal nobility: and perhaps this word might be inserted purposely with a view to exclude them. However, there is no instance of their sitting on trials for capital offences, even upon impeachments or indictments in full parliament, much less in the court we are now treating of; for indeed they usually withdraw voluntarily, but enter a protest declaring their right to stay. It is observable that, in the eleventh chapter of the constitutions of Clarendon, made in parliament 11 Hen. II. they are expressly ex-

[r] State Trials, Vol. IV. 214. 232, 3. [s] Fost. 139.

cused,

cuſed, rather than excluded, from ſitting and voting in trials, when they come to concern life or limb: "*epiſcopi, ſicut* "*cæteri barones, debent intereſſe judiciis cum baronibus, quouſque* "*perveniatur ad diminutionem membrorum, vel ad mortem:*" and Becket's quarrel with the king hereupon was not on account of the exception, (which was agreeable to the canon law,) but of the general rule, that compelled the biſhops to attend at all. And the determination of the houſe of lords in the earl of Danby's caſe [t], which hath ever ſince been adhered to, is conſonant to theſe conſtitutions; "that the "lords ſpiritual have a right to ſtay and ſit in court in ca-"pital caſes, till the court proceeds to the vote of guilty, or "not guilty." It muſt be noted, that this reſolution extends only to trials *in full parliament*: for to the court of the lord high ſteward (in which no vote can be given, but merely that of guilty, or not guilty) no biſhop, as ſuch, ever was or could be ſummoned; and though the ſtatute of king William regulates the proceedings in that court, as well as in the court [265] of parliament, yet it never intended to new-model or alter it's conſtitution; and conſequently does not give the lords ſpiritual any right in caſes of blood which they had not before [u]. And what makes their excluſion more reaſonable, is, that they have no right to be tried themſelves in the court of the lord high ſteward [w], and therefore ſurely ought not to be judges there. For the privilege of being thus tried depends upon nobility of blood, rather than a ſeat in the houſe; as appears from the trials of popiſh lords, of lords under age, and (ſince the union) of the Scots nobility, though not in the number of the ſixteen; and from the trials of females, ſuch as the queen conſort or dowager, and of all peereſſes by birth; and peereſſes by marriage alſo, unleſs they have, when dowagers, diſparaged themſelves by taking a commoner to their ſecond huſband (5).

[t] Lords' Journ. 15 May 1679. [w] Bro. *Abr. t. Trial.* 142.
[u] Fol. 248.

(5) But peereſſes by marriage cannot be ſaid to be ennobled by blood; for after the death of their huſbands they have even a leſs eſtate

3. The court of *king's bench* [x], concerning the nature of which we partly inquired in the preceding book [y], was (we may remember) divided into a *crown* side, and a *plea* side. And on the crown side, or crown office, it takes cognizance of all criminal cauſes, from high treaſon down to the moſt trivial miſdemeſnor or breach of the peace. Into this court alſo indictments from all inferior courts may be removed by writ of *certiorari*, and tried either at bar, or at *niſi prius*, by a jury of the county out of which the indictment is brought (6). The judges of this court are the ſupreme coroners of the kingdom. And the court itſelf is the principal court of criminal juriſdiction (though the two former are of greater dignity) known to the laws of England. For which reaſon by the coming of the court of king's bench into any county, (as it was removed to Oxford on account of the ſickneſs in 1665,) all former commiſſions of *oyer* and *terminer*, and general gaol delivery, are at once abſorbed and determined *ipſo facto*: in the ſame manner as by the old Gothic and Saxon conſtitu-

[x] 4 Inſt. 70. 2 Hal. P. C. 2. 2 Hawk. P. C. 6.

[y] See Vol. III. pag. 42.

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eſtate in their nobility than biſhops, it being only *durante viduitate*. See the editor's conjecture how the notion was originally introduced that biſhops were not entitled to a trial by the peers in parliament, Vol. I. p. 401. n. 8. Since that note was written, the editor has been happy in finding what he ſuggeſted only as a conjecture drawn from general principles confirmed by the more extenſive learning of the late Vinerian profeſſor Mr. Wooddeſon, who not only has adopted the ſame opinion, but has adduced in confirmation of it ſeveral inſtances of biſhops, who being arraigned before a jury, demanded the privileges of the church, and diſclaimed the authority of all ſecular juriſdictions. 2 *Woodd.* 585.

(6) All informations filed in the courts of king's bench, and all indictments removed there by *certiorari*, if not tried at the bar of the court, which rarely happens, muſt be tried at the aſſiſes by writ of *niſi prius*.

tions, "*jure vetuſto obtinuit, quieviſſe omnia inferiora judicia, "dicente jus rege*[z] (7)."

INTO this court of king's bench hath reverted all that was good and ſalutary of the juriſdiction of the court of *ſtar-chamber, camera ſtellata*[a]: which was a court of very antient

[z] Stiernhook, *l.* 1. *c.* 2.

[a] This is ſaid (Lamb. *Arch.* 154) to have been ſo called, either from the Saxon word *ſteoran* to *ſteer* or govern;—or from it's puniſhing the *crimen ſtellionatus*, or coſenage;—or becauſe the room wherein it ſtood, the old council chamber of the palace of Weſtminſter, (Lamb. 148.) which is now converted into the lottery-office, and forms the eaſtern ſide of new palace-yard, was full of windows;—or (to which Sir Edward Coke, 4 Inſt. 66. accedes) becauſe *baply* the roof thereof was at the firſt garniſhed with gilded *ſtars*. As all theſe are merely conjectures, (for no ſtars are now in the roof, nor any are ſaid to have remained there ſo late as the reign of queen Elizabeth,) it may be allowable to propoſe another conjectural etymology, as plauſible perhaps as any of them. It is well known that, before the baniſhment of the Jews under Edward I. their contracts and obligations were denominated in our antient records *ſtarra* or *ſtarrs*, from a corruption of the Hebrew word, *ſhetar*, a covenant, (Tovey's *Angl. judaic.* 32 Selden. tit. of hon. ii. 34. *Uxor. Ebraic.* i. 14.) Theſe ſtarrs, by an ordinance of Richard the firſt, preſerved by Hoveden, were commanded to be enrolled and depoſited in cheſts under three keys in certain places; one, and the moſt conſiderable, of which was in the king's exchequer at Weſtminſter; and no ſtarr was allowed to be valid, unleſs it were found in ſome of the ſaid repoſitories. (*Memorand. in Scac. P.* 6 *Edw.* I. prefixed to Maynard's year-book of Edw. II. fol. 8. Madox. hiſt. exch. c. vii. § 4, 5, 6.) The room at the exchequer, where the cheſts containing theſe ſtarrs were kept, was probably called the *ſtarr-chamber*; and, when the Jews were expelled the kingdom, was applied to the uſe of the king's council, ſitting in their judicial capacity. To confirm this, the firſt time the ſtar-chamber is mentioned in any record, it is ſaid to have been ſituated near the receipt of the exchequer at Weſtminſter: (the king's council, his chancellor, treaſurer, juſtices, and other ſages, were aſſembled *en le chambre des ſtelles pres la reſceipt al Weſtminſter.*—*Clauſ.* 41 *Edw. III. m.* 13.) For in proceſs of time, when the meaning of the Jewiſh *ſtarrs* was forgotten, the word *ſtar-chamber* was naturally rendered in law french, *le chaumbre des eſtoiles*, and in law latin *camera ſtellata*; which continued to be the ſtyle in latin till the diſſolution of that court (8).

(7) But by the 25 Geo. III. c. 18. it is enacted that the ſeſſion of oyer and terminer, and gaol delivery of the gaol of Newgate, for the county of Middleſex, ſhall not be diſcontinued on account of the commencement of the term, and the ſitting of the court of king's bench at Weſtminſter, but may be continued till the buſineſs is concluded. And the 32 Geo. III. c. 48. was paſſed to continue in like manner the ſeſſions of the peace, and of oyer and terminer, held before the juſtices of the peace for the county of Middleſex.

(8) In one of the ſtatutes of the univerſity of Cambridge, the antiquity of which is not known, the word *ſtatrum* is twice uſed for a ſchedule

original [b], but new modelled by ſtatutes 3 Hen. VII. c. 1, and 21 Hen. VIII. c. 20. conſiſting of divers lords ſpiritual and temporal, being privy counſellors, together with two judges of the courts of common law, without the intervention of any jury. Their juriſdiction extended legally over riots, perjury, miſbehaviour of ſheriffs, and other notorious miſdemeſnors, contrary to the laws of the land. Yet this was afterwards (as lord Clarendon informs us [c]) ſtretched "to "the aſſerting of all proclamations, and orders of ſtate: to "the vindicating of illegal commiſſions, and grants of mo-"nopolies; holding for honourable that which pleaſed, and "for juſt that which profited, and becoming both a court "of law to determine civil rights, and a court of revenue to "enrich the treaſury: the council table by proclamations "enjoining to the people that which was not enjoined by "the laws, and prohibiting that which was not prohibited; "and the ſtar-chamber, which conſiſted of the ſame perſons "in different rooms, cenſuring the breach and diſobedience "to thoſe proclamations by very great fines, impriſonments, "and corporal ſeverities: ſo that any diſreſpect to any acts "of ſtate, or to the perſons of ſtateſmen, was in no time "more penal, and the foundations of right never more in "danger to be deſtroyed." For which reaſons it was finally aboliſhed by ſtatute 16 Car. I. c. 10. to the general joy of the whole nation [d].

[b] Lamb. *Arch.* 156.

[c] Hiſt. of reb. book 1 & 3.

[d] The juſt odium into which this tribunal had fallen before it's diſſolution, has been the occaſion that few memorials have reached us of it's nature, juriſdiction, and practice; except ſuch as, on account of their enormous oppreſſion,

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ſchedule or inventory. The ſtatute is entitled *De computationę procuratorum*, and it directs that *in fine computi fiat* ſtarrum *per modum dividendæ, in quo ponentur omnia remanentia in communi ciſtâ tam pignora quam pecunia, ac etiam arreragia et debita, ita quod omnibus conſtare poterit evidenter, in quo ſtatu tunc univerſitas fuerit quoad bona, &c. Stat. Acad. Cant.* p. 32. Such inventories would be made at the king's exchequer, and the room where they were depoſited would probably be called the Star-chamber.

4. THE court of *chivalry*[e], of which we alſo formerly ſpoke[f] as a military court, or court of honour, when held before the earl marſhal only, is alſo a criminal court when held before the lord high conſtable of England jointly with the earl marſhal. And then it has juriſdiction over pleas of life and member, ariſing in matters of arms and deeds of war, as well out of the realm as within it. But the criminal, as well as civil part of it's authority, is fallen into entire diſuſe; there having been no permanent high conſtable of England (but only *pro hac vice* at coronations and the like) ſince the attainder and execution of Stafford duke of Buckingham in the thirteenth year of Henry VIII; the authority and charge, both in war and peace, being deemed too ample for a ſubject; ſo ample, that when the chief juſtice Fineux was aſked by king Henry the eighth, how far they extended, he declined anſwering: and ſaid, the deciſion of that queſtion belonged to the law of arms, and not to the law of England[g].

5. THE high court of *admiralty*[h], held before the lord high admiral of England, or his deputy, ſtiled the judge of the admiralty, is not only a court of civil, but alſo of criminal juriſdiction. This court hath cognizance of all crimes and offences committed either upon the ſea, or on the coaſts, out of the body or extent of any Engliſh county; and by ſtatute 15 Ric. II. c. 3. of death and mayhem happening in great ſhips being and hovering in the main ſtream of great rivers, below the bridges of the ſame rivers, which are then a ſort of ports or havens; ſuch as are the ports of

preſſion, are recorded in the hiſtories of the times. There are however to be met with ſome reports of its proceedings in Dyer, Croke, Coke, and other reporters of that age, and ſome in manuſcript; of which the author has two; one from 40 Eliz. to 13 Jac. I. the other for the firſt three years of king Charles: and there is in the Britiſh Muſeum (Harl. MSS. Vol. I. nº. 1226) a very full, methodical, and accurate account of the conſtitution and courſe of this court, compiled by William Hudſon of Gray's Inn, an eminent practitioner therein (9); and a ſhort account of the ſame, with copies of all it's proceſs, may alſo be found in 18 Rym. *Fœd.* 192, &c.

[e] 4 Inſt. 123. 2 Hawk. P. C. 9.

[f] See Vol. III. pag. 68.

[g] Duck *de authorit jur. civ.*

[h] 4 Inſt. 134. 147.

(9) Hudſon's Treatiſe of the Court of Star-Chamber is now publiſhed at the beginning of the 2d Vol. of Collectanea Juridica.

London and Gloucester, though they lie at a great diſtance from the ſea. But, as this court proceeded without jury, in a method much conformed to the civil law, the exerciſe of a criminal juriſdiction there was contrary to the genius of the law of England; inaſmuch as a man might be there deprived of his life by the opinion of a ſingle judge, without the judgment of his peers. And beſides, as innocent perſons might thus fall a ſacrifice to the caprice of a ſingle man, ſo very groſs offenders might, and did frequently, eſcape puniſhment: for the rule of the civil law is, how reaſonably I [269] ſhall not at preſent inquire, that no judgment of death can be given againſt offenders, without proof by two witneſſes, or a confeſſion of the fact by themſelves. This was always a great offence to the Engliſh nation: and therefore in the eighth year of Henry VI. it was endeavoured to apply a remedy in parliament: which then miſcarried for want of the royal aſſent. However, by the ſtatute 28 Hen. VIII. c. 15. it was enacted, that theſe offences ſhould be tried by commiſſioners of *oyer* and *terminer*, under the king's great ſeal; namely, the admiral, or his deputy, and three or four more; (among whom two common law judges are uſually appointed:) the indictment being firſt found by a grand jury of twelve men, and afterwards tried by a petty jury: and that the courſe of proceedings ſhould be according to the law of the land. This is now the only method of trying marine felonies in the court of admiralty: the judge of the admiralty ſtill preſiding therein, as the lord mayor is the preſident of the ſeſſion of *oyer* and *terminer* in London (10).

(10) The juriſdiction of the commiſſioners appointed under the 28 Hen. VIII. c. 15. was confined by that ſtatute to treaſons, felonies, robberies, murders, and confederacies; and therefore the 39 Geo. III. c. 15. declares that it is expedient that other offences committed on the ſeas ſhould be tried in the like manner; and it enacts that every offence committed upon the high ſeas ſhall be ſubject to the ſame puniſhment, as if it had been committed upon the ſhore, and ſhall be tried in the ſame manner as the crimes

These five courts may be held in any part of the kingdom, and their jurisdiction extends over crimes that arise throughout the whole of it, from one end to the other. What follow are also of a general nature, and universally diffused over the nation, but yet are of a local jurisdiction, and confined to particular districts. Of which species are

6, 7. The courts of *oyer* and *terminer*, and general *gaol delivery*[1]: which are held before the king's commissioners, among whom are usually two judges of the courts at Westminster, twice in every year in every county of the kingdom; except the four northern ones, where they are held only once, and London and Middlesex, wherein they are held eight times. These were slightly mentioned in the preceding book[k]. We then observed, that, at what is usually called the assises, the judges sit by virtue of five several authorities: two of which, the commission of *assise* and it's attendant jurisdiction of *nisi prius*, being principally of a civil nature, were then explained at large; to which I shall only add that these justices [270] have, by virtue of several statutes, a criminal jurisdiction also, in certain special cases[l]. The third, which is the commission of the *peace*, was also treated of in a former volume[m], when we inquired into the nature and office of a justice of the peace. I shall only add, that all the justices of the peace of any county, wherein the assizes are held, are bound by law to attend them, or else are liable to a fine; in order to return recognizances, &c. and to assist the judges in

[1] 4 Inst. 162. 168. 2 Hal. P. C. 22. 32. 2 Hawk. P. C. 14. 23.

[k] See Vol. III. pag. 60.

[l] 2 Hal. P. C. 39. 2 Hawk. P. C. 28.

[m] See Vol. I. pag. 351.

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crimes enumerated in the 28 Hen. VIII. c. 15. are directed to be tried.

And as persons tried for murder under that statute could not be found guilty of manslaughter, and where the circumstances made the crime manslaughter, were acquitted entirely, the 39 Geo. III. c. 15. expressly enacts that where persons tried for murder or manslaughter committed on the high seas are found guilty of manslaughter only, they shall be subject to the same punishment as if they had committed such manslaughter upon the land.

such matters as lie within their knowlege and jurisdiction, and in which some of them have probably been concerned, by way of previous examination. But the fourth authority is the commission of *oyer* and *terminer*[n], to hear and determine all treasons, felonies, and misdemesnors. This is directed to the judges and several others, or any two of them; but the judges or serjeants at law only are of the *quorum*, so that the rest cannot act without the presence of one of them. The words of the commission are, "to inquire, hear, and de-"termine:" so that by virtue of this commission they can only proceed upon an indictment found at the same assizes; for they must first inquire, by means of the grand jury or inquest, before they are impowered to hear and determine by the help of the petit jury. Therefore they have besides, fifthly, a commission of general *gaol delivery*[o]; which empowers them to try and deliver every prisoner, who shall be in the gaol when the judges arrive at the circuit town, whenever or before whomsoever indicted, or for whatever crime committed. It was antiently the course to issue special writs of gaol delivery for each particular prisoner, which were called the writs *de bono et malo*[p]: but these being found inconvenient and oppressive, a *general* commission for all the prisoners has long been established in their stead. So that, one way or other, the gaols are in general cleared, and all offenders tried, punished, or delivered, twice in every year: a constitution of singular use and excellence. Sometimes also, upon urgent occasions, the king issues a special or extraordinary commission of *oyer* and *terminer*, and *gaol delivery*, confined to those offences which stand in need of immediate inquiry and punishment: upon which the course of proceeding is much the same, as upon general and ordinary commissions. Formerly it was held, in pursuance of the statutes 8 Ric. II. c. 2. and 33 Hen. VIII. c. 4. that no judge or other lawyer could act in the commission of *oyer* and *terminer*, or in that of gaol delivery, within his own country, where he was born or inhabited; in like manner as they are prohibited from being judges of assize and

[271]

[n] See appendix, § 1. [o] *Ibid.* [p] 2 Inst. 45.

determining

determining civil cauſes. But that local partiality, which the jealouſy of our anceſtors was careful to prevent, being judged leſs likely to operate in the trial of crimes and miſdemeſnors, than in matters of property and diſputes between party and party, it was thought proper by the ſtatute 12 Geo. II. c. 27. to allow any man to be a juſtice of *oyer* and *terminer* and general gaol delivery within any county of England.

8. THE court of general *quarter ſeſſions* of the peace[q] is a court that muſt be held in every county once in every quarter of a year; which by ſtatute 2 Hen. V. c. 4. is appointed to be in the firſt week after michaelmas day; the firſt week after the epiphany; the firſt week after the cloſe of eaſter; and in the week after the tranſlation of St. Thomas the martyr, or the ſeventh of July. It is held before two or more juſtices of the peace, one of which muſt be of the *quorum*. The juriſdiction of this court, by ſtatute 34 Edw. III. c. 1. extends to the trying and determining all felonies and treſpaſſes whatſoever: though they ſeldom, if ever, try any greater offence than ſmall felonies within the benefit of clergy (11); their commiſſion providing, that, if any caſe of difficulty ariſes, they

[q] 4 Inſt. 170. 2 Hal P. C. 42. 2 Hawk. P. C. 32.

(11) It is the practice to try all ſimple larcenies at the quarter ſeſſions, whatever may be the value of the article ſtolen; but it is ſtated in the indictment to be of ſome value not exceeding a ſhilling, in order to reduce the crime to petty larceny. The juſtices ſeldom try any felonies, upon conviction of which the priſoner muſt pray the benefit of clergy, or now the benefit of the ſtatute. For before the 5 Ann. c. 6. ſentence of death in all ſuch caſes muſt have been paſſed upon thoſe, who could not read. And it may ſtill be doubted whether it muſt not be paſſed upon a convict, who obſtinately refuſes to pray the benefit of that ſtatute. See p. 370. *poſt*.

The quarter ſeſſions have no juriſdiction to try an indictment for perjury at the common law, as this was held not to be a breach of the peace, which was the chief end of the inſtitution of the

shall not proceed to judgment, but in the presence of one of the justices of the courts of king's bench or common pleas, or one of the judges of assise. And therefore murders, and other capital felonies, are usually remitted for a more solemn
[272] trial to the assises. They cannot also try any new-created offence, without express power given them by the statute which creates it[e]. But there are many offences, and particular matters, which by particular statutes belong properly to this jurisdiction, and ought to be prosecuted in this court: as, the smaller misdemesnors, against the public or commonwealth, not amounting to felony; and especially offences relating to the game, highways, alehouses, bastard children, the settlement and provision for the poor, vagrants, servants wages, apprentices, and popish recusants[f]. Some of these are proceeded upon by indictment; and others in a summary way by motion and order thereupon; which order may for the most part, unless guarded against by particular statutes, be removed into the court of king's bench, by writ of *certiorari facias*, and be there either quashed or confirmed. The records or rolls of the sessions are committed to the custody of a special officer denominated the *custos rotulorum*, who is always a justice of the *quorum*; and among them of the *quorum* (saith Lambard[g]) a man for the most part especially picked out, either for wisdom, countenance, or credit. The nomination of the *custos rotulorum* (who is the principal *civil* officer in the county, as the lord lieutenant is the chief in *military* command) is by the king's sign manual: and to him the nomination of the clerk of the peace belongs; which office he is expressly forbidden to sell for money[h] (12).

[e] 4 Mod. 379. Salk. 406. Lord Raym. 1144.
[f] See Lambard *eirenarcha* and Burn's Justice.
[g] b. 4. c. 3.
[h] Stat. 37 Hen. VIII. c. 1. 1 W. & M. st. 2. c. 21.

commission of the peace to preserve; but the 5 Eliz. c. 9. gives the quarter sessions expressly jurisdiction to try the perjuries specified in that statute. 2 *Hawk.* 40. *Burn, tit* Perjury.

(12) But the justices at the quarter sessions upon a complaint of his misconduct may suspend or discharge him from his office. 1 W. c. 21. s. 6. See *Burn, tit.* Clerk, &c.

IN

In moſt corporation towns there are quarter-ſeſſions kept before juſtices of their own, within their reſpective limits: which have exactly the ſame authority as the general quarter-ſeſſions of the county, except in a very few inſtances; one of the moſt conſiderable of which is the matter of appeals from orders of removal of the poor, which, though they be from the orders of corporation juſtices, muſt be to the ſeſſions of the county, by ſtatute 8 & 9 W. III. c. 30. In both corporations and counties at large, there is ſometimes kept a ſpecial or petty ſeſſion, by a few juſtices, for diſpatching [273] ſmaller buſineſs in the neighbourhood between the times of the general ſeſſions; as, for licenſing alehouſes, paſſing the accounts of the pariſh officers, and the like.

9. The *ſheriff's tourn*[u], or rotation, is a court of record, held twice every year within a month after eaſter and michaelmas, before the ſheriff, in different parts of the county; being indeed only the turn of the ſheriff to keep a court-leet in each reſpective hundred[w]. This therefore is the great court-leet of the county, as the county court is the court-baron: for out of this, for the eaſe of the ſheriff, was taken

10. The *court-leet*, or *view of frankpledge*[x], which is a court of record, held once in the year and not oftener[y], within a particular hundred, lordſhip, or manor, before the ſteward of the leet: being the king's court granted by charter to the lords of thoſe hundreds or manors. It's original intent was to view the frankpledges, that is, the freemen within the liberty; who, (we may remember[z],) according to the inſtitution of the great Alfred, were all mutually pledges for the good behaviour of each other. Beſides this, the preſervation of the peace, and the chaſtiſement of divers minute offences againſt the public good, are the objects both of the court-leet and the ſheriff's tourn: which have exactly the ſame juriſdiction, one being only a larger ſpecies of the other,

[u] 4 Inſt. 259. 2 Hal. P. C. 69. 2 Hawk. P. C. 55.
[w] Mirr. c. 1. § 13 & 16.
[x] 4 Inſt. 261. 2 Hawk. P. C. 72.
[y] Mirror, c. 1. § 10.
[z] See Vol. III. pag. 113.

extending over more territory, but not over more cauſes. All freeholders within the precinct are obliged to attend them, and all perſons commorant therein; which commorancy conſiſts in uſually lying there: a regulation, which owes it's original to the laws of king Canute[a]. But perſons under twelve and above ſixty years old, peers, clergymen, women, and the king's tenants in antient demeſne, are excuſed from attendance there: all others being bound to appear upon the jury, if required, and make their due preſentments. It was alſo antiently the cuſtom to ſummon all the king's ſubjects, as
[274] they reſpectively grew to years of diſcretion and ſtrength, to come to the court-leet, and there take the oath of allegiance to the king. The other general buſineſs of the leet and tourn, was to preſent by jury all crimes whatſoever that happened within their juriſdiction; and not only to preſent, but alſo to puniſh, all trivial miſdemeſnors, as all trivial debts were recoverable in the court-baron, and county court: juſtice, in theſe minuter matters of both kinds, being brought home to the doors of every man by our antient conſtitution. Thus in the Gothic conſtitution, the *haereda*, which anſwered to our court-leet, "*de omnibus quidem cognoſcit, non tamen de omnibus judicat*[b]." The objects of their juriſdiction are therefore unavoidably very numerous: being ſuch as in ſome degree, either leſs or more, affect the public weal, or good governance of the diſtrict in which they ariſe; from common nuſances and other material offences againſt the king's peace and public trade, down to eaves-dropping, waifs, and irregularities in public commons. But both the tourn and the leet have been for a long time in a declining way: a circumſtance, owing in part to the diſcharge granted by the ſtatute of Marlbridge, 52 Hen. III. c. 10. to all prelates, peers, and clergymen from their attendance upon theſe courts; which occaſioned them to grow into diſrepute. And hence it is that their buſineſs hath for the moſt part gradually devolved upon the quarter ſeſſions;

[a] *part.* 2. *c.* 19. [b] Stiernh. *de jur. Goth. l.* 3. *c.* 2.

which

which it is particularly directed to do in some cases by statute 1 Ed. IV. c. 2.

11. THE court of the *coroners*[c] is also a court of record, to inquire, when any one dies in prison, or comes to a violent or sudden death, by what manner he came to his end. And this he is only entitled to do *super visum corporis*. Of the coroner and his office we treated at large in a former volume[d], among the public officers and ministers of the kingdom; and therefore shall not here repeat our inquiries: only mentioning his court, by way of regularity, among the criminal courts of the nation.

12. THE court of the *clerk of the market*[e] is incident to every fair and market in the kingdom, to punish misdemesnors therein; as a court of *pie poudre* is, to determine all disputes relating to private or civil property. The object of this jurisdiction[f] is principally the recognizance of weights and measures, to try whether they be according to the true standard thereof, or no: which standard was antiently committed to the custody of the bishop, who appointed some clerk under him to inspect the abuse of them more narrowly: and hence this officer, though now usually a layman, is called the *clerk* of the market[g]. If they be not according to the standard, then, besides the punishment of the party by fine, the weights and measures themselves ought to be burnt. This is the most inferior court of criminal jurisdiction in the kingdom; though the objects of it's coercion were esteemed among the Romans of such importance to the public, that they were committed to the care of some of their most dignified magistrates, the curule aediles. [275]

II. THERE are a few other criminal courts of greater dignity than many of these, but of a more confined and partial

[c] 4 Inst. 271. 2 Hal. P. C. 53. 2 Hawk. P. C. 42.
[d] See Vol I. pag. 349.
[e] 4 Inst. 273.
[f] See stat. 17 Car. II. c. 19. 22 Car. II. c. 8. 23 Car. II. c. 12.
[g] Bacon of English Gov. b. 1. c. 8.

jurisdiction; extending only to some particular places which the royal favour, confirmed by act of parliament, has distinguished by the privilege of having peculiar courts of their own, for the punishment of crimes and misdemesnors arising within the bounds of their cognizance. These, not being universally dispersed, or of general use, as the former, but confined to one spot, as well as to a determinate species of causes, may be denominated private or special courts of criminal jurisdiction.

I SPEAK not here of ecclesiastical courts; which punish spiritual sins, rather than temporal crimes, by penance, contrition, and excommunication, *pro salute animae*; or, which is looked upon as equivalent to all the rest, by a sum of mo-
[276] ney to the officers of the court by way of commutation of penance. Of these we discoursed sufficiently in the preceding book [b]. I am now speaking of such courts as proceed according to the course of the common law; which is a stranger to such unaccountable barterings of public justice.

1. AND, first, the court of the *lord steward, treasurer*, or *comptroller* of the king's *household* [a], was instituted by statute 3 Hen. VII. c. 14. to inquire of felony by any of the king's sworn servants, in the cheque roll of the household, under the degree of a lord, in confederating, compassing, conspiring, and imagining the death or destruction of the king; or any lord or other of his majesty's privy council, or the lord steward, treasurer, or comptroller of the king's house. The inquiry, and trial thereupon, must be by a jury according to the course of the common law, consisting of twelve sad men, (that is, sober and discreet persons,) of the king's household.

2. THE court of the *lord steward* of the king's *household*, or (in his absence) of the treasurer, comptroller, and steward of the *marshalsea* [k], was erected by statute 33 Hen. VIII. c. 12. with a jurisdiction to inquire of, hear, and determine, all treasons, misprisions of treason, murders, manslaughters,

[b] See Vol. III. pag. 61. [a] 4 Inst. 133. [k] 4 Inst. 133. 2 Hal. P. C. 7.

bloodshed,

bloodshed, and other malicious strikings; whereby blood shall be shed in; or within the limits, (that is, within two hundred feet from the gate,) of any of the palaces and houses of the king, or any other house where the royal person shall abide. The proceedings are also by jury, both a grand and a petit one, as at common law; taken out of the officers and sworn servants of the king's household. The form and solemnity of the process, particularly with regard to the execution of the sentence for cutting off the hand, which is part of the punishment for shedding blood in the king's court, are very minutely set forth in the said statute 33 Hen. VIII. and the several officers of the servants of the household in and about such execution are described; from the serjeant of the wood yard, who furnishes [277] the chopping-block, to the serjeant farrier, who brings hot irons to sear the stump.

3. As in the preceding book[1] we mentioned the courts of the two universities, or their chancellor's courts, for the redress of civil injuries; it will not be improper now to add a short word concerning the jurisdiction of their criminal courts, which is equally large and extensive. The chancellor's court of Oxford (with which university the author hath been chiefly conversant, though probably that of Cambridge hath also a similar jurisdiction) hath authority to determine all causes of property, wherein a privileged person is one of the parties, except only causes of freehold; and also all criminal offences or misdemesnors under the degree of treason, felony, or mayhem. The prohibition of meddling with freehold still continues: but the trial of treason, felony, and mayhem, by a particular charter is committed to the university jurisdiction in another court, namely, the court of the *lord high steward* of the university.

For by the charter of 7 Jun. 2 Hen. IV. (confirmed, among the rest, by the statute 13 Eliz. c. 29.) cognizance is granted to the university of Oxford of all indictments of treasons, insurrections, felony, and mayhem, which shall

[1] See Vol. III. pag. 83.

be

be found in any of the king's courts againſt a ſcholar or privileged perſon; and they are to be tried before the high ſteward of the univerſity, or his deputy, who is to be nominated by the chancellor of the univerſity for the time being. But, when his office is called forth into action, ſuch high ſteward muſt be approved by the lord high chancellor of England; and a ſpecial commiſſion under the great ſeal is given to him, and others, to try the indictment then depending, according to the law of the land and the privileges of the ſaid univerſity. When therefore an indictment is found
[278] at the aſſiſes, or elſewhere, againſt any ſcholar of the univerſity, or other privileged perſon, the vice chancellor may claim the cognizance of it; and (when claimed in due time and manner) it ought to be allowed him by the judges of aſſiſe: and then it comes to be tried in the high ſteward's court. But the indictment muſt firſt be found by a grand jury, and then the cognizance claimed: for I take it that the high ſteward cannot proceed originally *ad inquirendum*; but only, after inqueſt in the common law courts, *ad audiendum et determinandum*. Much in the ſame manner, as when a peer is to be tried in the court of the lord high ſteward of Great Britain, the indictment muſt firſt be found at the aſſizes, or in the court of king's bench, and then (in conſequence of a writ of *certiorari*) tranſmitted to be finally heard and determined before his grace the lord high ſteward and the peers.

WHEN the cognizance is ſo allowed, if the offence be *inter minora crimina*, or a miſdemeſnor only, it is tried in the chancellor's court by the ordinary judge. But if it be for treaſon, felony, or mayhem, it is then, and then only, to be determined before the high ſteward, under the king's ſpecial commiſſion to try the ſame. The proceſs of the trial is this. The high ſteward iſſues one precept to the ſheriff of the county, who thereupon returns a panel of eighteen freeholders; and another precept to the bedells of the univerſity, who thereupon return a panel of eighteen matriculated laymen, "*laicos privilegio univerſitatis gaudentes*:" and by a

jury formed *de medietate*, half of freeholders and half of matriculated perſons, is the indictment to be tried; and that in the Guildhall of the city of Oxford. And if execution be neceſſary to be awarded, in conſequence of finding the party guilty, the ſheriff of the county muſt execute the univerſity proceſs; to which he is annually bound by an oath.

I HAVE been the more minute in deſcribing theſe proceed- [279]
ings, as there has happily been no occaſion to reduce them into practice for more than a century paſt; nor will it perhaps ever be thought adviſeable to revive them, though it is not a right that merely reſts *in ſcriptis* or theory, but has formerly often been carried into execution. There are many inſtances, one in the reign of queen Elizabeth, two in that of James the firſt, and two in that of Charles the firſt, where indictments for murder have been challenged by the vice-chancellor at the aſſiſes, and afterwards tried before the high ſteward by jury. The commiſſions under the great ſeal, the ſheriff's and bedell's panels, and all the other proceedings on the trial of the ſeveral indictments, are ſtill extant in the archives of that univerſity.

CHAPTER THE TWENTIETH.

OF SUMMARY CONVICTIONS.

WE are next, according to the plan I have laid down, to take into conſideration the proceedings in the courts of criminal juriſdiction, in order to the puniſhment of offences. Theſe are plain, eaſy, and regular; the law not admitting any fictions, as in civil cauſes, to take place where the life, the liberty, and the ſafety of the ſubject are more immediately brought into jeopardy. And theſe proceedings are diviſible into two kinds; *ſummary*, and *regular*: of the former of which I ſhall briefly ſpeak, before we enter upon the latter, which will require a more thorough and particular examination.

By a *ſummary* proceeding I mean principally ſuch as is directed by ſeveral acts of parliament (for the common law is a ſtranger to it, unleſs in the caſe of contempts) for the conviction of offenders, and the inflicting of certain penalties created by thoſe acts of parliament. In theſe there is no intervention of a jury, but the party accuſed is acquitted or condemned by the ſuffrage of ſuch perſon only, as the ſtatute has appointed for his judge. An inſtitution deſigned profeſſedly for the greater eaſe of the ſubject, by doing him ſpeedy juſtice, and by not haraſſing the freeholders with frequent and troubleſome attendances to try every minute
[281] offence. But it has of late been ſo far extended, as if a check be not timely given, to threaten the diſuſe of our admirable

mirable and truly Engliſh trial by jury, unleſs only in capital caſes. For,

I. Of this ſummary nature are all trials of offences and frauds contrary to the laws of the *excife*, and other branches of the *revenue*: which are to be inquired into and determined by the commiſſioners of the reſpective departments, or by juſtices of the peace in the country; officers, who are all of them appointed and removable at the diſcretion of the crown. And though ſuch convictions are abſolutely neceſſary for the due collection of the public money, and are a ſpecies of mercy to the delinquents, who would be ruined by the expenſe and delay of frequent proſecutions by action or indictment; and though ſuch has uſually been the *conduct* of the commiſſioners, as ſeldom (if ever) to afford juſt grounds to complain of oppreſſion; yet when we again [a] conſider the various and almoſt innumerable branches of this revenue; which may be in their turns the ſubjects of fraud, or at leaſt complaints of fraud, and of courſe the objects of this ſummary and arbitrary juriſdiction; we ſhall find that the power of theſe officers of the crown over the property of the people is increaſed to a very formidable height.

II. Another branch of ſummary proceedings is that before *juſtices of the peace*, in order to inflict divers petty pecuniary mulcts, and corporal penalties, denounced by act of parliament for many diſorderly offences; ſuch as common ſwearing, drunkenneſs, vagrancy, idleneſs, and a vaſt variety of others, for which I muſt refer the ſtudent to the juſtice-books formerly cited [b], and which uſed to be formerly puniſhed by the verdict of a jury in the court-leet. This change in the adminiſtration of juſtice hath however had ſome miſchievous effects; as, 1. The almoſt entire diſuſe and contempt of the court-leet, and ſheriff's tourn, the king's antient courts of common law, formerly much revered and reſpected. 2. The burthenſome increaſe of the buſineſs of a juſtice of [282]

[a] See Vol. I. pag. 319, &c. [b] Lambard and Burn.

the

the peace, which discourages so many gentlemen of rank and character from acting in the commission; from an apprehension that the duty of their office would take up too much of that time, which they are unwilling to spare from the necessary concerns of their families, the improvement of their understandings, and their engagements in other services of the public. Though if *all* gentlemen of fortune had it both in their power, and inclinations, to act in this capacity, the business of a justice of the peace would be more divided, and fall the less heavy upon individuals: which would remove what in the present scarcity of magistrates is really an objection so formidable, that the country is greatly obliged to any gentleman of figure, who will undertake to perform that duty, which in consequence of his rank in life he owes more peculiarly to his country. However, this backwardness to act as magistrates, arising greatly from this increase of summary jurisdiction, is productive of, 3. A third mischief: which is, that this trust, when slighted by gentlemen, falls of course into the hands of those who are not so; but the mere tools of office. And then the extensive power of a justice of the peace, which even in the hands of men of honour is highly formidable, will be prostituted to mean and scandalous purposes, to the low ends of selfish ambition, avarice, or personal resentment. And from these ill consequences we may collect the prudent foresight of our antient lawgivers, who suffered neither the property nor the punishment of the subject to be determined by the opinion of any one or two men; and we may also observe the necessity of not deviating any farther from our antient constitution, by ordaining new penalties to be inflicted upon summary convictions.

The process of these summary convictions, it must be owned, is extremely speedy. Though the courts of common law have thrown in one check upon them, by making it necessary to *summon* the party accused before he is con-
[283] demned. This is now held to be an indispensable requisite [c]:

[c] Salk. 181. 2 Lord Raym. 1405.

though

though the juſtices long ſtruggled the point; forgetting that rule of natural reaſon expreſſed by Seneca,

> " *Qui ſtatuit aliquid, parte inaudita altera,*
> " *Aequum licet ſtatuerit, haud aequus fuit :*"

a rule, to which all municipal laws, that are founded on the principles of juſtice, have ſtrictly conformed; the Roman law requiring a citation at the leaſt; and our own common law never ſuffering any fact (either civil or criminal) to be tried, till it has previouſly compelled an appearance by the party concerned. After this ſummons, the magiſtrate, in ſummary proceedings, may go on to examine one or more witneſſes, as the ſtatute may require, upon oath; and then make his conviction of the offender, in writing: upon which he uſually iſſues his warrant, either to apprehend the offender, in caſe corporal puniſhment is to be inflicted on him; or elſe to levy the penalty incurred, by diſtreſs and ſale of his goods (1). This is, in general, the method of ſummary proceedings before a juſtice or juſtices of the peace: but for particulars we muſt have recourſe to the ſeveral ſtatutes, which create the offence, or inflict the puniſhment: and which uſually chalk out the method by which offenders are to be convicted. Otherwiſe they fall of courſe under the general rule, and

(1) By the 18 Geo. III. c. 19. juſtices of peace out of ſeſſions are empowered to award coſts againſt either the perſon complaining, or the perſon againſt whom the complaint is made; which if not paid may be levied by diſtreſs. And if no goods can be found of ſuch perſon, he may be committed to hard labour for any time not leſs than ten days, or more than a month, or until ſuch coſts be paid.

But where the penalty is 5*l.* or more, the coſts may at the diſcretion of the juſtice be deducted from the penalty, provided the deduction ſhall not exceed one fifth of the penalty.

The juſtices at the ſeſſions may lay down rules for ſuch coſts, which rules, if they receive the approbation in writing of a judge of aſſiſe, ſhall be binding on all perſons whatever.

can

and accompanied with violence, such as forcible *rescous* and the like [f]; or when they import a disobedience to the king's great prerogative writs of prohibition, *habeas corpus* [g], and the rest. Some of these contempts may arise in the face of the court, as by rude and contumelious behaviour; by obstinacy, perverseness, or prevarication; by breach of the peace, or any wilful disturbance whatever: others in the absence of the party; as by disobeying or treating with disrespect the king's writ, or the rules or process of the court; by perverting such writ or process to the purposes of private malice, extortion, or injustice; by speaking or writing contemptuously of the court, or judges, acting in their judicial capacity; by printing false accounts (or even true ones without proper permission) of causes then depending in judgment; and by any
[286] thing in short that demonstrates a gross want of that regard and respect, which when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people.

THE process of attachment, for these and the like contempts, must necessarily be as antient as the laws themselves. For laws, without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory. A power therefore in the supreme courts of justice to suppress such contempts, by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal. Accordingly we find it actually exercised, as early as the annals of our law extend. And, though a very learned author [h] seems inclinable to derive this process from the statute of Westm. 2. 13 Edw. I. c. 39. (which ordains, that in case the process of the king's courts be *resisted* by the power of any great man, the sheriff shall chastise the resisters by imprisonment, "*a qua non deliberen-*

[f] Styl. 227. 2 Hawk. P. C. 152. [g] 8 Jun. 1757. Cro Jac. 419. Salk. 586. [h] Gilb. Hist. C. P. ch. 3.
[f] 4 Burr. 632. Lords Journ. 7 Feb.

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's tur ſine ſpeciali praecepto domini regis:" and if the ſheriff himſelf be reſiſted, he ſhall certify to the courts the names of the principal offenders, their aiders, conſenters, commanders, and favourers, and by a ſpecial writ judicial they ſhall be *attached* by their bodies to appear before the court, and if they be convicted thereof they ſhall be puniſhed at the king's pleaſure, without any interfering by any other perſon whatſoever,) yet he afterwards more juſtly concludes, that it is a part of the *law of the land*; and, as ſuch, is *confirmed* by the ſtatute of *magna carta*.

IF the contempt be committed in the face of the court, the offender may be inſtantly apprehended and impriſoned, at the diſcretion of the judges[j], without any farther proof or examination. But in matters that ariſe at a diſtance, and of which the court cannot have ſo perfect a knowledge, unleſs by the confeſſion of the party or the teſtimony of others, if the judges upon *affidavit* ſee ſufficient ground to ſuſpect that a contempt has been committed, they either make a rule on [287] the ſuſpected party to ſhew cauſe why an attachment ſhould not iſſue againſt him[k]; or, in very flagrant inſtances of contempt, the attachment iſſues in the firſt inſtance[l]; as it alſo does, if no ſufficient cauſe be ſhewn to diſcharge, and thereupon the court confirms and makes abſolute, the original rule. This proceſs of attachment is merely intended to bring the party into court: and, when there, he muſt either ſtand committed, or put in bail, in order to anſwer upon oath to ſuch *interrogatories* as ſhall be adminiſtered to him, for the better information of the court with reſpect to the circumſtances of the contempt. Theſe interrogatories are in the nature of a charge or accuſation, and muſt by the courſe of the court be exhibited within the firſt four days[m]: and, if any of the interrogatories is improper, the defendant may refuſe to anſwer it, and move the court to have it ſtruck out[n]. If the party can clear himſelf upon oath, he is diſ-

[j] Staundf. P. C. 79. *b*.
[k] Styl. 277.
[l] Salk. 84. Stra. 185. 564.
[m] 6 Mod. 73.
[n] Stra. 444.

charged; but, if perjured, may be profecuted for the perjury[n]. If he confeſſes the contempt, the court will proceed to correct him by fine, or impriſonment, or both, and ſometimes by a corporal or infamous puniſhment[o]. If the contempt be of ſuch a nature, that, when the fact is once acknowledged, the court can receive no farther information by interrogatories than it is already poſſeſſed of, (as in the caſe of a *reſcous*[p],) the defendant may be admitted to make ſuch ſimple acknowlegement, and receive his judgment, without anſwering to any interrogatories (3): but if he wilfully and obſtinately refuſes to anſwer, or anſwers in an evaſive manner, he is then clearly guilty of a high and repeated contempt, to be puniſhed at the diſcretion of the court.

[288] It cannot have eſcaped the attention of the reader, that this method, of making the defendant anſwer upon oath to a criminal charge, is not agreeable to the genius of the common law in any other inſtance[q]; and ſeems indeed to have been derived to the courts of king's bench and common pleas through the medium of the courts of equity. For the whole proceſs of the courts of equity, in the ſeveral ſtages of a cauſe, and finally to enforce their decrees, was, till the introduction of ſequeſtrations, in the nature of a proceſs of contempt; acting only *in perſonam* and not *in rem*. And there, after the party in contempt has anſwered the interrogatories, ſuch his anſwer may be contradicted and diſproved by *affidavits* of the adverſe party: whereas, in the courts of law, the admiſſion of the party to purge himſelf by oath is

[n] 6 Mod. 73.
[o] Cro. Car. 146.
[p] The king v. Elkins. M. 8 Geo. III. B. R.
[q] See Vol. III. pag. 100, 101.

(3) Although the defendant acknowledges all the facts charged againſt him, yet it is the practice of the court to compel him to anſwer interrogatories, unleſs they are waived by the proſecutor. 5 *T. R.* 362.

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more favourable to his liberty, though perhaps not leſs dangerous to his conſcience; for, if he clears himſelf by his anſwers, the complaint is totally diſmiſſed. And, with regard to this ſingular mode of trial, thus admitted in this one particular inſtance, I ſhall only for the preſent obſerve, that as the proceſs by attachment in general appears to be extremely antient[r], and has in more modern times been recognized, approved, and confirmed by ſeveral expreſs acts of parliament[s], ſo the method of examining the delinquent himſelf upon oath, with regard to the contempt alleged, is at leaſt of as high antiquity[t], and by long and immemorial uſage is now become the law of the land.

[r] Yearb. 20 Hen. VI. 37. 22 Edw. IV. 29.

[s] Stat. 43 Eliz. c. 6. § 2. 13 Car. II. ſt. 2. c. 2. § 4. 9 & 10 W. III. c. 15. 12 Ann. ſt. 2. c. 15. § 5.

[t] M. 5 Edw. IV. rot. 75. cited in Raſt. Ent. 268. pl. 5.

CHAPTER THE TWENTY-FIRST.

OF ARRESTS.

WE are now to conſider the regular and ordinary method of proceeding in the courts of criminal juriſdiction; which may be diſtributed under twelve general heads, following each other in a progreſſive order: *viz.* 1. Arreſt; 2. Commitment and bail; 3. Proſecution; 4. Proceſs; 5. Arraignment, and it's incidents; 6. Plea, and iſſue; 7. Trial, and conviction; 8. Clergy; 9. Judgment, and it's conſequences; 10. Reverſal of judgment; 11. Reprieve, or pardon; 12. Execution: all which will be diſcuſſed in the ſubſequent part of this book.

FIRST then, of an *arreſt*: which is the apprehending or reſtraining of one's perſon, in order to be forthcoming to anſwer an alleged or ſuſpected crime. To this arreſt all perſons whatſoever are, without diſtinction, equally liable in all criminal caſes: but no man is to be arreſted, unleſs charged with ſuch a crime, as will at leaſt juſtify holding him to bail, when taken. And, in general, an arreſt may be made four ways: 1. By warrant: 2. By an officer without warrant: 3. By a private perſon alſo without warrant: 4. By an hue and cry.

[290] 1. A WARRANT may be granted in extraordinary caſes by the privy council, or ſecretaries of ſtate[a]; but ordinarily by juſtices of the peace. This they may do in any caſes where

[a] 1 Lord Raym. 65.

they

they have a juriſdiction over the offence; in order to compel the perſon accuſed to appear before them [b]: for it would be abſurd to give them power to examine an offender, unleſs they had alſo a power to compel him to attend, and ſubmit, to ſuch examination. And this extends undoubtedly to all treaſons, felonies, and breaches of the peace; and alſo to all ſuch offences as they have power to puniſh by ſtatute. Sir Edward Coke indeed [c] hath laid it down that a juſtice of the peace cannot iſſue a warrant to apprehend a felon upon bare ſuſpicion; no, not even till an indictment be actually found: and the contrary practice is by others [d] held to be grounded rather upon connivance, than the expreſs rule of law; though now by long cuſtom eſtabliſhed. A doctrine, which would in moſt caſes give a looſe to felons to eſcape without puniſhment; and therefore ſir Matthew Hale hath combated it with invincible authority, and ſtrength of reaſon: maintaining, 1. That a juſtice of peace hath power to iſſue a warrant to apprehend a perſon *accuſed* of felony, though not yet *indicted* [e]; and, 2. That he may alſo iſſue a warrant to apprehend a perſon *ſuſpected* of felony, though the original ſuſpicion be not in himſelf, but in the party that prays his warrant; becauſe he is a competent judge of the probability offered to him of ſuch ſuſpicion. But in both caſes it is fitting to examine upon oath the party requiring a warrant, as well to aſcertain that there *is* a felony or other crime actually committed, without which no warrant ſhould be granted; as alſo to *prove* the cauſe and probability of ſuſpecting the party, againſt whom the warrant is prayed [f]. This warrant ought to be under the hand and ſeal of the juſtice, ſhould ſet forth the time and place of making, and the cauſe for which it is made, and ſhould be directed to the conſtable, or other peace officer, (or, it may be, to any private [291] perſon by name [g],) requiring him to bring the party either generally before *any* juſtice of the peace for the county, or only before the juſtice who granted it; the warrant in the

[b] 2 Hawk. P. C. 84.
[c] 4 Inſt. 176.
[d] 2 Hawk. P. C. 84.
[e] 2 Hal. P. C. 108.
[f] *Ibid.* 110.
[g] Salk. 176.

latter case being called a *special* warrant[h]. A *general* warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for it's uncertainty[i]; for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion. And a warrant to apprehend all persons, guilty of a crime therein specified, is no legal warrant: for the point, upon which it's authority rests, is a fact to be decided on a subsequent trial; namely, whether the person apprehended thereupon be really guilty or not. It is therefore in fact *no* warrant at all; for it will not justify the officer who acts under it[k]; whereas a warrant, properly penned, (even though the magistrate who issues it should exceed his jurisdiction,) will, by statute 24 Geo. II. c. 44. at all events indemnify the officer, who executes the same ministerially. And, when a warrant is received by the officer, he is bound to execute it, so far as the jurisdiction of the magistrate and himself extends. A warrant from the chief, or other, justice of the court of king's bench extends all over the kingdom: and is *teste'd*, or *dated*, *England*; not *Oxfordshire*, *Berks*, or other particular county. But the warrant of a justice of the peace in one county, as Yorkshire, must be backed, that is, signed by a justice of the peace in another, as Middlesex, before it can be executed there. Formerly, regularly speaking, there ought to have
[292] been a fresh warrant in every fresh county; but the practice

[h] 2 Hawk. P. C. 85.

[i] 1 Hal. P. C. 580. 2 Hawk. P. C. 82.

[k] A practice had obtained in the secretaries office ever since the restoration, grounded on some clauses in the acts for regulating the press, of issuing *general* warrants to take up (without naming any person in particular) the authors, printers, and publishers of such obscene or seditious libels, as were particularly specified in the warrant. When those acts expired in 1694, the same practice was inadvertently continued, in every reign, and under every administration, except the four last years of queen Anne, down to the year 1763; when such a warrant being issued to apprehend the authors, printers, and publishers of a certain seditious libel, it's validity was disputed; and the warrant was adjudged by the whole court of king's bench to be void, in the case of Money v. Leach. *Trin.* 5 *Geo. III. B. R.* After which, the issuing of such general warrants was declared illegal by a vote of the house of Commons. (Com. Journ. 22 Apr. 1763.)

of

of backing warrants had long prevailed without law, and was at last authorised by statutes 23 Geo. II. c. 26. and 24 Geo. II. c. 55. And now, by statute 13 Geo. III. c. 31. any warrant for apprehending an English offender, who may have escaped into Scotland, and *vice versa*, may be endorsed and executed by the local magistrates, and the offender conveyed back to that part of the united kingdoms, in which such offence was committed.

2. ARRESTS by *officers*, *without warrant*, may be executed, 1. By a justice of the peace; who may himself apprehend, or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence [l]. 2. The sheriff, and 3. The coroner, may apprehend any felon within the county without warrant. 4. The constable, of whose office we formerly spoke [m], hath great original and inherent authority with regard to arrests. He may, without warrant, arrest any one for a breach of the peace, committed in his view, and carry him before a justice of the peace. And, in case of felony *actually* committed, or a dangerous wounding whereby felony is like to ensue, he may upon probable suspicion arrest the felon; and for that purpose is authorised (as upon a justice's warrant) to break open doors, and even to kill the felon if he cannot otherwise be taken; and, if he or his assistants be killed in attempting such arrests, it is murder in all concerned [n]. 5. Watchmen, either those appointed by the statute of Winchester, 13 Edw. I. c. 4. to keep watch and ward in all towns from sunsetting to sunrising, or such as are mere assistants to the constable, may *virtute officii* arrest all offenders, and particularly night-walkers, and commit them to custody till the morning [o].

3. ANY private person (and *a fortiori* a peace officer) that is present when any felony is committed, is bound by the law to arrest the felon, on pain of fine and imprisonment, if he [293]

[l] 2 Hal. P. C. 88.
[m] See Vol. I. pag. 355.
[n] 2 Hal. P. C. 88—96.
[o] *Ibid.* 98.

escapes

escapes through the negligence of the standers-by [p]. And they may justify breaking open doors upon following such felon; and if *they kill him*, provided he cannot be otherwise taken, it is justifiable; though if *they are killed* in endeavouring to make such arrest, it is murder [q]. Upon probable suspicion also a private person may arrest the felon, or other person so suspected [r] (1). But he cannot justify breaking open doors to do it; and if either party kill the other in the attempt, it is manslaughter, and no more [s]. It is no more, because there is no malicious design to kill: but it amounts to so much, because it would be of most pernicious consequence, if, under pretence of suspecting felony, any private person might break open a house, or kill another; and also because such arrest upon suspicion is barely *permitted* by the law, and not *enjoined*, as in the case of those who are present when a felony is committed.

4 THERE is yet another species of arrest, wherein both officers and private men are concerned, and that is upon an *hue* and *cry* raised upon a felony committed. An hue (from *huer*, to shout) and cry, *hutesium et clamor*, is the old com-

[p] 2 Hawk. P. C. 74.
[q] 2 Hal. P. C. 77.
[r] Stat. 30 Geo. II. c. 24.
[s] 2 Hal. P. C. 82, 83.

(1) Where a felony has been actually committed, a private person acting with a good intention, and upon such information as amounts to a reasonable and probable ground of suspicion, is justified in apprehending without a warrant the suspected person in order to carry him before a magistrate. *Cald.* 291. But where a private person had delivered another into the custody of a constable, upon a suspicion, which appeared afterwards to be unfounded, it was held that the person so arrested might maintain an action of trespass for an assault and false imprisonment against such private person, although a felony had been actually committed. 6 *T. R.* 315. But a peace-officer upon a reasonable charge of felony, may justify an arrest without a warrant, although no felony has been committed. Samuel *v.* Payne, *Doug.* 345. When doors may be broken open. See *Foster.* 136 & 319.

mon law proceſs of purſuing, with horn and with voice, all felons, and ſuch as have dangerouſly wounded another[t]. It is alſo mentioned by ſtatute Weſtm. 1. 3 Edw. I. c. 9. and 4 Edw I. *de officio coronatoris*. But the principal ſtatute, relative to this matter, is that of Wincheſter, 13 Edw. I. c. 1. & 4. which directs, that from thenceforth every country ſhall be ſo well kept, that immediately upon robberies and felonies committed, freſh ſuit ſhall be made from town to town, and from county to county; and that hue and cry ſhall be raiſed upon the felons, and they that keep the town ſhall follow with hue and cry, with all the town and the towns near; and ſo hue and cry ſhall be made from town to [294] town, until they be taken and delivered to the ſheriff. And, that ſuch hue and cry may more effectually be made, the hundred is bound by the ſame ſtatute, c. 3. to anſwer for all robberies therein committed, unleſs they take the felon; which is the foundation of an action againſt the hundred[u], in caſe of any loſs by robbery. By ſtatute 27 Eliz. c. 13. no hue and cry is ſufficient, unleſs made with both horſemen and footmen. And by ſtatute 8 Geo. II. c. 16. the conſtable or like officer, refuſing or neglecting to make hue and cry, forfeits 5*l*: and the whole vill or diſtrict is ſtill in ſtrictneſs liable to be amerced, according to the law of Alfred, if any felony be committed therein and the felon eſcapes. An inſtitution, which hath long prevailed in many of the eaſtern countries, and hath in part been introduced even into the Mogul empire, about the beginning of the laſt century; which is ſaid to have effectually delivered that vaſt territory from the plague of robbers, by making in ſome places the villages, in others the officers of juſtice, reſponſible for all the robberies committed within their reſpective diſtricts[w]. Hue and cry[x] may be raiſed either by precept of a juſtice of the peace, or by a peace officer, or by any private man that knows of a felony. The party raiſing it muſt acquaint the

[t] Bracton. *l.* 3. *tr* 2. *c.* 1. §. 1. Mirr. c. 2. §. 6.

[u] See Vol. III. pag. 161.

[w] Mod. Un. Hiſt. vi. 383. vii. 156.

[x] 2 Hal. P. C. 100—104.

conſtable

conſtable of the vill with all the circumſtances which he knows of the felony, and the perſon of the felon; and thereupon the conſtable is to ſearch his own town, and raiſe all the neighbouring vills, and make purſuit with horſe and foot; and in the proſecution of ſuch hue and cry the conſtable and his attendants have the ſame powers, protection, and indemnification, as if acting under the warrant of a juſtice of the peace. But if a man wantonly or maliciouſly raiſes an hue and cry, without cauſe, he ſhall be ſeverely puniſhed as a diſturber of the public peace [1].

In order to encourage farther the apprehending of certain felons, rewards and immunities are beſtowed on ſuch as bring them to juſtice, by divers acts of parliament. The ſtatute
[295] 4 & 5 W. & M. c. 8. enacts, that ſuch as apprehend a highwayman, and proſecute him to conviction, ſhall receive a reward of 40 *l.* from the public; to be paid to them (or, if killed in the endeavour to take him, their executors) by the ſheriff of the county; beſides the horſe, furniture, arms, money, and other goods taken upon the perſon of ſuch robber; with a reſervation of the right of any perſon from whom the ſame may have been ſtolen: to which the ſtatute 8 Geo. II. c. 16. ſuperadds 10 *l.* to be paid by the hundred indemnified by ſuch taking. By ſtatutes 6 & 7 W. III. c. 17. and 15 Geo. II. c. 28. perſons apprehending and convicting any offender againſt thoſe ſtatutes, reſpecting the coinage, ſhall (in caſe the offence be treaſon or felony) receive a reward of forty pounds; or ten pounds, if it only amount to counterfeiting the copper coin. By ſtatute 10 & 11 W. III. c. 23. any perſon apprehending and proſecuting to conviction a felon guilty of burglary, houſebreaking, horſeſtealing, or private larciny to the value of 5 *s.* from any ſhop, warehouſe, coach-houſe, or ſtable, ſhall be excuſed from all pariſh offices. And by ſtatute 5 Ann. c. 31. any perſon ſo apprehending and proſecuting a burglar, or felonious houſebreaker, (or, if killed in the attempt, his executors,) ſhall be

[1] 1 Hawk. P. C. 75.

entitled

entitled to a reward of 40 *l*. By ſtatute 6 Geo. I. c. 23. perſons diſcovering, apprehending, and proſecuting to conviction, any perſon taking reward for helping others to their ſtolen goods, ſhall be entitled to forty pounds. By ſtatute 14 Geo. II. c. 6. explained by 15 Geo. II. c. 34. any perſon apprehending and proſecuting to conviction ſuch as ſteal, or kill with intent to ſteal, any ſheep or other cattle ſpecified in the latter of the ſaid acts, ſhall for every ſuch conviction receive a reward of ten pounds. Laſtly, by ſtatute 16 Geo. II. c. 15. and 8 Geo. III. c. 15. perſons diſcovering, apprehending, and convicting felons and others being found at large during the term for which they are ordered to be tranſported, ſhall receive a reward of twenty pounds.

* The ſtatutes 4 & 5 W. & M. c. 8. 6 & 7 W. III. c. 17. and 5 Ann. c 31. (together with 3 Geo. I. c. 15. §. 4. which directs the method of re-imburſing the ſheriffs) are extended to the county palatine of Durham, by Stat. 14 Geo. III. c. 46.

CHAPTER THE TWENTY-SECOND.

OF COMMITMENT AND BAIL.

WHEN a delinquent is arrested by any of the means mentioned in the preceding chapter, he ought regularly to be carried before a justice of the peace: and how he is there to be treated, I shall next shew, under the second head, of *commitment* and *bail*.

THE justice, before whom such prisoner is brought, is bound immediately to examine the circumstances of the crime alleged: and to this end by statute 2 & 3 Ph. & M. c. 10. he is to take in writing the examination of such prisoner, and the information of those who bring him: which, Mr. Lambard observes[a], was the first warrant given for the examination of a felon in the English law. For, at the common law, *nemo tenebatur prodere seipsum*: and his fault was not to be wrung out of himself, but rather to be discovered by other means, and other men. If upon this inquiry it manifestly appears, either that no such crime was committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him. Otherwise he must either be committed to prison, or give bail; that is, put in securities for his appearance, to answer the charge against him. This commitment therefore being only for safe custody, wherever bail will answer the same intention, it ought to be taken; as in most of the inferior crimes: but in felonies, and other offences of a capi-

[a] Eirenarch. b. 2. c. 7. See pag. 357.

tal

tal nature, no bail can be a ſecurity equivalent to the actual cuſtody of the perſon. For what is there that a man may not be induced to forfeit, to ſave his own life? and what ſatisfaction or indemnity is it to the public, to ſeize the effects of them who have bailed a murderer, if the murderer himſelf be ſuffered to eſcape with impunity? Upon a principle ſimilar to which, the Athenian magiſtrates, when they took a ſolemn oath, never to keep a citizen in bonds that could give three ſureties of the ſame quality with himſelf, did it with an exception to ſuch as had embezzled the public money, or been guilty of treaſonable practices [b]. What the nature of bail is, hath been ſhewn in the preceding book [c], *viz.* a delivery or bailment, of a perſon to his ſureties, upon their giving (together with himſelf) ſufficient ſecurity for his appearance: he being ſuppoſed to continue in their friendly cuſtody, inſtead of going to gaol. In civil caſes we have ſeen that every defendant is bailable; but in criminal matters it is otherwiſe. Let us therefore inquire, in what caſes the party accuſed ought, or ought not, to be admitted to bail.

AND, firſt, to refuſe or delay to bail any perſon bailable, is an offence againſt the liberty of the ſubject, in any magiſtrate by the common law [d], as well as by the ſtatute Weſtm. 1. 3 Edw. I. c. 15. and the *habeas corpus* act, 31 Car. II. c. 2. And, leſt the intention of the law ſhould be fruſtrated by the juſtices requiring bail to a greater amount than the nature of the caſe demands, it is expreſsly declared by ſtatute 1 W. & M. ſt. 2. c. 1. that exceſſive bail ought not to be required; though what bail ſhall be called exceſſive, muſt be left to the courts, on conſidering the circumſtances of the caſe, to determine. And, on the other hand, if the magiſtrate takes inſufficient bail, he is liable to be fined, if the criminal doth not appear [e]. Bail may be taken either in court, or in ſome particular caſes by the ſheriff, coroner, or other magiſtrate: but moſt uſually by the juſtices of the peace. Regularly, in all offences either againſt the common

[b] Pott. Antiq. b. 1. c. 18.
[c] See Vol. III. pag. 290.
[d] 2 Hawk. P. C. 90.
[e] *Ibid.* 89.

law

law or act of parliament, that are below felony, the offender ought to be admitted to bail, unless it be prohibited by some special act of parliament[f]. In order therefore more precisely to ascertain what offences *are* bailable.

LET us next see, who may *not* be admitted to bail, or, what offences are *not* bailable. And here I shall not consider any one of those cases in which bail is ousted by statute, from prisoners *convicted* of particular offences: for then such imprisonment without bail is part of their sentence and punishment. But, where the imprisonment is only for safe custody *before* the conviction, and not for punishment *afterwards*, in such cases bail is ousted or taken away, wherever the offence is of a very enormous nature: for then the public is entitled to demand nothing less than the highest security that can be given, *viz.* the body of the accused; in order to insure that justice shall be done upon him, if guilty. Such persons therefore, as the author of the mirror observes[g], have no other sureties but the four walls of the prison. By the antient common law, before[h] and since[i] the conquest, all felonies were bailable, till murder was excepted by statute: so that persons might be admitted to bail before conviction almost in every case. But the statute Westm. 1. 3 Edw. I. c. 15. takes away the power of bailing in treason, and in divers instances of felony. The statutes 23 Hen. VI. c. 9. and 1 & 2 Ph. & Mar. c. 13. give farther regulations in this matter; and upon the whole we may collect[k], that no justice of the peace can bail, 1. Upon an accusation of treason: nor, 2. Of murder: nor, 3. In case of manslaughter, if the prisoner be clearly the slayer, and not barely suspected to be so; or if any indictment be found against him: nor, 4. Such as, being committed for felony, have broken prison; because it not only carries a presumption of guilt, but is also superadding one felony to another: 5. Per-

[f] 2 Hal. P. C. 127.
[g] c. 2. §. 24.
[h] 2 Inst. 189.
[i] *In omnibus placitis de felonia solet accusatus per plegios dimitti, præterquam in placito de homicidio, ubi ad terrorem aliter statutum est.* (Glanv. l. 14. c. 1.)
[k] 2 Inst. 186. 2 Hal. P. C. 129.

tions outlawed: 6. Such as have abjured the realm: 7. Approvers, of whom we shall speak in a subsequent chapter, [299] and persons by them accused: 8. Persons taken with the mainour, or in the fact of felony: 9. Persons charged with arson: 10. Excommunicated persons, taken by writ *de excommunicato capiendo*: all which are clearly not admissible to bail by the justices. Others are of a dubious nature, as, 11. Thieves openly defamed and known: 12. Persons charged with other felonies, or manifest and enormous offences, not being of good fame: and, 13. Accessories to felony, that labour under the same want of reputation. These seem to be in the discretion of the justices, whether bailable or not. The last class are such as *must* be bailed upon offering sufficient surety; as, 14. Persons of good fame, charged with a bare suspicion of manslaughter, or other inferior homicide: 15. Such persons, being charged with petit larciny, or any felony not before specified: or, 16. With being accessory to any felony. Lastly, it is agreed that the court[l] of king's bench (or any judge[m] thereof in time of vacation) may bail for any crime whatsoever, be it treason[n], murder[o], or any other offence, according to the circumstance of the case. And herein the wisdom of the law is very manifest. To allow bail to be taken commonly for such enormous crimes, would greatly tend to elude the public justice: and yet there are cases, though they rarely happen, in which it would be hard and unjust to confine a man in prison, though accused even of the greatest offence. The law has therefore provided one court, and only one, which has a discretionary power of bailing in any case: except only, even to this high jurisdiction, and of course to all inferior ones, such persons as are

[l] 2 Inst. 189. Latch. 12. Vaugh. 157. Comb. 111. 298. 1 Comyns Dig. 495.

[m] Skin. 683. Salk. 105. Stra. 911. 1 Comyns Dig. 497.

[n] In the reign of queen Elizabeth it was the unanimous opinion of the judges, that no court could bail upon a commitment, for a charge of high treason by any of the queen's privy council. (1 Anders. 298.)

[o] *In omnibus placitis de felonia solet accusatus per plegios dimitti, praeterquam in placito de homicidio.* (Glan. *l.* 14. *c.* 1.) *Sciendum tamen quod, in hoc placito, non solet accusatus per plegios dimitti, nisi ex regiae potestatis beneficio.* (*Ibid. c.* 3.)

committed by either houſe of parliament, ſo long as the ſeſ-
[300] ſion laſts; or ſuch as are committed for contempts by any of the king's ſuperior courts of juſtice [p].

Upon the whole, if the offence be not bailable, or the party cannot find bail, he is to be committed to the county gaol by the *mittimus* of the juſtice, or warrant under his hand and ſeal, containing the cauſe of his commitment; there to abide till delivered by due courſe of law [q]. But this impriſonment, as has been ſaid, is only for ſafe cuſtody, and not for puniſhment: therefore, in this dubious interval between the commitment and trial, a priſoner ought to be uſed with the utmoſt humanity; and neither be loaded with needleſs fetters, or ſubjected to other hardſhips than ſuch as are abſolutely requiſite for the purpoſe of confinement only; though, what are ſo requiſite, muſt too often be left to the diſcretion of the gaolers; who are frequently a mercileſs race of men, and, by being converſant in ſcenes of miſery, ſteeled againſt any tender ſenſation. Yet the law (as formerly held) would not juſtify them in fettering a priſoner, unleſs where he was unruly, or had attempted to eſcape [r]: this being the humane language of our antient lawgivers [s], "*cuſtodes poenam "ſibi commiſſorum non augeant, nec eos torqueant; ſed omni "ſaevitia remota, pietateque adhibita, judicia debite exequan-"tur.*"

[p] Staundf. P. C. 73. *b.*
[q] 2 Hal. P. C. 122.
[r] 2 Inſt. 381. 3 Inſt. 34.
[s] Flet. *l.* 1. *c.* 26.

CHAPTER THE TWENTY-THIRD.

OF THE SEVERAL MODES OF PROSECUTION.

THE next ſtep towards the puniſhment of offenders is their proſecution, or the manner of their formal accuſation. And this is either upon a previous finding of the fact by an inqueſt or grand jury; or without ſuch previous finding. The former way is either by *preſentment*, or *indictment*.

I. A PRESENTMENT, *generally* taken, is a very comprehenſive term; including not only preſentments properly ſo called, but alſo inquiſitions of office, and indictments by a grand jury. A preſentment, *properly* ſpeaking, is the notice taken by a grand jury of any offence from their own knowledge or obſervation [a], without any bill of indictment laid before them at the ſuit of the king. As, the preſentment of a nuſance, a libel, and the like; upon which the officer of the court muſt afterwards frame an indictment [b], before the party preſented can be put to anſwer it. An inquiſition of office is the act of a jury, ſummoned by the proper officer to inquire of matters relating to the crown, upon evidence laid before them. Some of theſe are in themſelves convictions, and cannot afterwards be traverſed or denied; and therefore the inqueſt, or jury, ought to hear all that can be alleged on both ſides. Of this nature are all inquiſitions of *felo de ſe*; of flight in perſons accuſed of felony; of deodands,

[a] Lamb. *Eirenarch.* l. 4. c. 5. [b] 2 Inſt. 739.

and the like; and preſentments of petty offences in the ſheriff's tourn or court leet, whereupon the preſiding officer may ſet a fine. Other inquiſitions may be afterwards traverſed and examined; as particularly the coroner's inquiſi-
[302] tion of the death of a man, when it finds any one guilty of homicide: for in ſuch caſes the offender ſo preſented muſt be arraigned upon this inquiſition, and may diſpute the truth of it; which brings it to a kind of indictment, the moſt uſual and effectual means of proſecution, and into which we will therefore inquire a little more minutely.

II. AN *indictment*[c] is a written accuſation of one or more perſons of a crime or miſdemeſnor, preferred to, and preſented upon oath by, a grand jury. To this end the ſheriff of every county is bound to return to every ſeſſion of the peace, and every commiſſion of *oyer* and *terminer*, and of general gaol delivery, twenty four good and lawful men of the county, ſome out of every hundred, to inquire, preſent, do, and execute all thoſe things, which on the part of our lord the king ſhall then and there be commanded them[d]. They ought to be freeholders, but to what amount is uncertain[e]: which ſeems to be *caſus omiſſus*, and as proper to be ſupplied by the legiſlature as the qualifications of the petit jury; which were formerly equally vague and uncertain, but are now ſettled by ſeveral acts of parliament. However, they are uſually gentlemen of the beſt figure in the county. As many as appear upon this panel are ſworn upon the grand jury, to the amount of twelve at the leaſt, and not more than twenty-three; that twelve may be a majority. Which number, as well as the conſtitution itſelf, we find exactly deſcribed, ſo early as the laws of king Ethelred[f]. "*Exeant ſenivres duo-*
"*decim thani, et praefectus cum eis, et jurent ſuper ſanctuarium*
"*quod eis in manus datur, quod nolint ullum innocentem accu-*
"*ſare, nec aliquem noxium celare.*" In the time of king Richard the firſt (according to Hoveden) the proceſs of

[c] See Appendix, § 1.
[d] 2 Hal. P. C. 154.
[e] *Ibid.* 155.
[f] Wilk. *LL. Angl. Sax.* 117.

electing

LORD CHIEF JUSTICE RAYMOND.
chardson Pinx!
Audinet Sculp
Published as the Act directs by T. Cadell, Strand, June 1. 1795.

electing the grand jury, ordained by that prince, was as follows: four knights were to be taken from the county at large, who chose two more out of every hundred; which two associated to themselves ten other principal freemen, and those twelve were to answer concerning all particulars relating to their own district. This number was probably found too large and inconvenient; but the traces of this institution still remain, in that some of the jury must be summoned out of every hundred. This grand jury are previously instructed in the articles of their inquiry, by a charge from the judge who presides upon the bench. They then withdraw, to sit and receive indictments, which are preferred to them in the name of the king, but at the suit of any private prosecutor; and they are only to hear evidence on behalf of the prosecution: for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined; and the grand jury are only to inquire upon their oaths, whether there be sufficient cause to call upon the party to answer it. A grand jury however ought to be thoroughly persuaded of the truth of an indictment, so far as their evidence goes; and not to rest satisfied merely with remote probabilities: a doctrine, that might be applied to very oppressive purposes [e] (1). [303]

THE grand jury are sworn to inquire, only for the body of the county, *pro corpore comitatus*; and therefore they cannot regularly inquire of a fact done out of that county for

[e] State Trials. IV. 183.

(1) Upon an indictment for high treason against the earl of Shaftesbury in the year 1681, the evidence was given in public before the grand jury at the Old Bailey; and the gentlemen of the jury expressing some doubts with regard to the legality of the proceeding, lord C. J. Pemberton and C. J. North both declared that it had always been the practice to examine the witnesses publicly before the grand jury, whenever it had been requested by those who prosecuted for the king. 3 *Harg. St. Tr.* 417. But I apprehend this is the last instance of such a procedure.

which they are ſworn, unleſs particularly enabled by act of parliament. And to ſo high a nicety was this matter anciently carried, that where a man was wounded in one county, and died in another, the offender was at common law indictable in neither, becauſe no complete act of felony was done in any one of them: but by ſtatute 2 & 3 Edw. VI. c. 24. he is now indictable in the county where the party died. And, by ſtatute 2 Geo. II. c. 21. if the ſtroke or poiſoning be in England, and the death upon the ſea or out of England; or, *vice verſa*; the offenders and their acceſſories may be indicted in the county where either the death, poiſoning, or ſtroke ſhall happen. And ſo in ſome other caſes: as particularly, where treaſon is committed out of the realm, it may be inquired of in any county within the realm, as the king ſhall direct, in purſuance of ſtatutes 26 Hen. VIII. c. 13. 33 Hen. VIII. c. 23. 35 Hen. VIII. c. 2. and 5 & 6 Edw. VI. c. 11. And counterfeiters, waſhers, or miniſhers
[304] of the current coin, together with all manner of felons and their acceſſories, may by ſtatute 26 Hen. VIII. c. 6. (confirmed and explained by 34 & 35 Hen. VIII. c. 26. § 75, 76.) be indicted and tried for thoſe offences, if committed in any part [h] of Wales, before the juſtices of gaol delivery and of the peace in the next adjoining county of England, where the king's writ runneth: that is, at preſent in the county of Hereford or Salop; and not, as it ſhould ſeem, in the county of Cheſter or Monmouth: the one being a county palatine where the king's writ did not run, and the other a part of Wales, in 26 Hen. VIII. [i] Murders alſo, whether committed in England or in foreign parts [k], may by virtue of the ſtatute 33 Hen. VIII. c. 23. be inquired of and tried by the king's ſpecial commiſſion in any ſhire or place in the kingdom. By ſtatute 10 & 11 W. III. c. 25. all robberies and other capital crimes, committed in Newfoundland, may be inquired of and tried in any county in England. Offences againſt the black act, 9 Geo. I. c. 22. may be inquired of and tried in any county of England, at the option of the

[h] Stra. 533. 2 Mod. 134.

[i] See Hardr. 66.

[k] Ely's caſe, at the old bailey, Dec. 1720. Roache's caſe, Dec. 1775.

proſecutor

profecutor [l]. So felonies in deſtroying turnpikes, or works upon navigable rivers, erected by authority of parliament, may, by ſtatutes 8 Geo. II. c. 20. and 13 Geo. III. c. 84. be inquired of and tried in any adjacent county. By ſtatute 26 Geo. II. c. 19. plundering or ſtealing from any veſſel in diſtreſs or wrecked, or breaking any ſhip contrary to 12 Ann. ſt. 2. c. 18. [m], may be proſecuted either in the county where the fact is committed, or in any county next adjoining; and, if committed in Wales, then in the next adjoining Engliſh county: by which is underſtood to be meant ſuch Engliſh county as, by the ſtatute 26 Hen. VIII. above-mentioned, had before a concurrent juriſdiction with the great ſeſſions of felonies committed in Wales [n]. Felonies committed out of the realm, in burning or deſtroying the king's ſhips, ma- [305] gazines, or ſtores, may by ſtatute 12 Geo. III. c. 24. be inquired of and tried in any county of England, or in the place where the offence is committed. By ſtatute 13 Geo. III. c. 63. miſdemeſnors committed in India may be tried upon information or indictment in the court of king's bench in England; and a mode is marked out for examining witneſſes by commiſſion, and tranſmitting their depoſitions to the court. But, in general, all offences muſt be inquired into as well as tried in the county where the fact is committed. Yet if larciny be committed in one county, and the goods carried into another, the offender may be indicted in either; for the offence is complete in both [o]. Or, he may be indicted in England for larciny in Scotland, and carrying the goods with him into England, or *vice verſa*; or for receiving in one part of the united kingdoms goods that have been ſtolen in another [p]. But for robbery, burglary, and the like, he can only be indicted where the fact was actually committed: for though

[l] So held by all the judges, H. 11 Geo. III. in the caſe of Richard Mortis on a caſe reſerved from the old bailey.

[m] See page 244.

[n] At Shrewſbury ſummer aſſizes, 1774, Parry and Roberts were convicted of plundering a veſſel which was wrecked on the coaſt of Angleſey. It was moved in arreſt of judgment, that Cheſter and not Salop was the next adjoining Engliſh county. But all the judges (in Mich. 15 Geo. III.) held the proſecution to be regular.

[o] 1 Hal. P. C. 507.

[p] Stat. 13 Geo. III. c. 31.

the carrying away and keeping of the goods is a continuation of the original taking, and is therefore larciny in the second county, yet it is not a robbery or burglary in that jurisdiction. And if a person be indicted in one county for larciny of goods originally taken in another, and be thereof convicted or stands mute, he shall not be admitted to his clergy; provided the original taking be attended with such circumstances, as would have ousted him of his clergy by virtue of any statute made previous to the year 1691[q] (2).

When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to endorse on the back of the bill, "*ignoramus*:" or, we know nothing of it; intimating, that though the facts might possibly be true, that truth did not appear to them: but now, they assert in English, more absolutely "not a true bill;" or (which is the better way) "not found;" and then the party is discharged without farther answer. But a fresh bill may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation, they then [306] endorse upon it, "a true bill;" antiently, "*billa vera*." The indictment is then said to be found, and the party stands indicted. But to find a bill there must at least twelve of the jury agree: for so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offence, unless by the unanimous voice of twenty-four of his equals and neighbours: that is, by twelve at least of the grand jury, in the first place, assenting to the accusation; and afterwards, by the whole petit jury, of twelve more, finding him guilty upon his trial. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree[r]. And the indictment, when so found, is publicly delivered into court.

[q] Stat. 25 Hen. VIII. c. 3. 3 W. & M. c. 9.

[r] 2 Hal. P. C. 161.

(2) Bigamy may be tried either in the county where the offence is committed, or where the offender is apprehended. 1 *Jac. I.* c. 11.

INDICT-

INDICTMENTS must have a precise and sufficient certainty. By statute 1 Hen. V. c. 5. all indictments must set forth the christian name, surname, and addition of the state and degree, mystery, town, or place, and the county of the offender: and all this to identify his *person*. The *time*, and *place*, are also to be ascertained, by naming the day, and township, in which the fact was committed: though a mistake in these points is in general not held to be material, provided the *time* be laid previous to the finding of the indictment, and the *place* to be within the jurisdiction of the court; unless where the place is laid, not merely as a *venue*, but as part of the description of the fact[f]. But sometimes the *time* may be very material, where there is any limitation in point of time assigned for the prosecution of offenders; as by the statute 7 Will. III. c. 3. which enacts, that no prosecution shall be had for any of the treasons or misprisions therein mentioned, (except an assassination designed or attempted on the person of the king,) unless the bill of indictment be found within three years after the offence committed[g]: and, in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given. The offence itself must also be set forth with clearness and certainty; and in some crimes particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the offence, that no other words, however synonymous they may seem, are capable of doing it. Thus, in treason, the facts must be laid to be done, "treasonably, and against his allegiance;" anciently, "*proditorie et contra ligeantiae suae debitum*:" else the indictment is void. In indictments for murder, it is necessary to say that the party indicted "murdered," not "killed," or "slew," the other; which till the late statute was expressed in Latin by the word "*murdravit*." In all indictments for felonies, the adverb "feloniously, *felonice*," must be used; and for burglaries also, "*burglariter*," or in English, "burglariously:" and all these to ascertain the intent. In rapes, the word "*rapuit*," or "ravished," is [307]

[f] 2 Hawk. P. C. 435.
[g] Fost. 249.
[h] See Vol. III. pag. 321.

neceſſary, and muſt not be expreſſed by any periphraſis; in order to render the crime certain. So in larcinies alſo, the words "*felonice cepit et aſportavit*, feloniouſly took and carried "away," are neceſſary to every indictment; for theſe only can expreſs the very offence. Alſo in indictments for murder, the length and depth of the wound ſhould in general be expreſſed, in order that it may appear to the court to have been of a mortal nature: but if it goes through the body, then it's dimenſions are immaterial, for that is apparently ſufficient to have been the cauſe of the death. Alſo, where a limb, or the like, is abſolutely cut off, there ſuch deſcription is impoſſible[u]. Laſtly, in indictments, the *value* of the thing, which is the ſubject or inſtrument of the offence, muſt ſometimes be expreſſed. In indictments for larcinies this is neceſſary, that it may appear whether it be grand or petit larciny; and whether entitled or not to the benefit of clergy: in homicide of all ſorts it is neceſſary; as the weapon with which it is committed is forfeited to the king as a deodand.

THE remaining methods of proſecution are without any previous finding by a jury, to fix the authoritative ſtamp of veriſimilitude upon the accuſation. One of theſe, by the common law, was when a thief was taken *with the mainour*, that is, with the thing ſtolen upon him *in manu*. For he might, when ſo detected *flagrante delicto*, be brought into court, arraigned, and tried, without indictment: as by the
[308] Daniſh law he might be taken and hanged upon the ſpot, without accuſation or trial[w]. But this proceeding was taken away by ſeveral ſtatutes in the reign of Edward the third[x]: though in Scotland a ſimilar proceſs remains to this day[y]. So that the only ſpecies of proceeding at the ſuit of the king, without a previous indictment or preſentment by a grand jury, now ſeems to be that of *information*.

III. INFORMATIONS are of two ſorts; firſt, thoſe which are partly at the ſuit of the king, and partly at that of a ſub-

[u] 5 Rep. 122.
[w] Stiern *de jure Sueon. l.* 3. c. 5.
[x] 2 Hal. P. C. 149.
[y] Lord Kaims. I. 331.

ject;

ject; and secondly, such as are only in the name of the king. The former are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the king, and another to the use of the informer; and are a sort of *qui tam* actions, (the nature of which was explained in a former volume [z],) only carried on by a criminal instead of a civil process: upon which I shall therefore only observe, that by the statute 31 Eliz. c. 5. no prosecution upon any penal statute, the suit and benefit whereof are limited in part to the king and in part to the prosecutor, can be brought by any common informer after one year is expired since the commission of the offence; nor on behalf of the crown after the lapse of two years longer; nor, where the forfeiture is originally given only to the king, can such prosecution be had after the expiration of two years from the commission of the offence.

THE informations that are exhibited in the name of the king alone, are also of two kinds: first, those which are truly and properly his own suits, and filed *ex officio* by his own immediate officer, the attorney general: secondly, those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person or common informer: and they are filed by the king's coroner and attorney in the court of king's bench, usually called the master of the crown-office, who is for this purpose the standing officer of the public. The objects of the king's own prosecutions, filed *ex officio* by his own attorney general, are properly such enormous misdemesnors, as peculiarly tend to disturb or endanger [309] his government, or to molest or affront him in the regular discharge of his royal functions. For offences so high and dangerous, in the punishment or prevention of which a moment's delay would be fatal, the law has given to the crown the power of an immediate prosecution, without waiting for any previous application to any other tribunal: which power, thus necessary, not only to the ease and safety, but even to the

[z] See Vol. III. pag. 162.

very

very exiſtence of the executive magiſtrate, was originally reſerved in the great plan of the Engliſh conſtitution, wherein proviſion is wiſely made for the due preſervation of all it's parts. The objects of the other ſpecies of informations, filed by the maſter of the crown-office upon the complaint or relation of a private ſubject, are any groſs and notorious miſdemeſnors, riots, batteries, libels, and other immoralities of an atrocious kind [2], not peculiarly tending to diſturb the government, (for thoſe are left to the care of the attorney general,) but which, on account of their magnitude or pernicious example, deſerve the moſt public animadverſion. And when an information is filed, either thus, or by the attorney general *ex officio*, it muſt be tried by a petit jury of the county where the offence ariſes: after which, if the defendant be found guilty, the court muſt be reſorted to for his puniſhment (3).

[2] 2 Hawk. P. C. 260.

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(3) If an information, or an indictment for a miſdemeanour removed into the court of king's bench by certiorari, be not of ſuch importance as to be tried at the bar of the court, it is ſent down by writ of *niſi prius* into the county where the crime is charged to have been committed, and it is there tried either by a common or a ſpecial jury, like a record in a civil action; and if the defendant is found guilty, he muſt afterwards receive judgment from the court of king's bench. But where an indictment for treaſon or felony is removed by certiorari, the law upon the ſubject ſeems to be fully ſtated by Lord Hale in the two following ſections. 2 *P. C.* 41.

"As to an indictment of felony or treaſon removed out of the "county by certiorari, and the party pleading, the record is ſent "down by *niſi prius* to be tried; the judges of *niſi prius* may "upon that record proceed to trial, and judgment, and execu-"tion, as if they were juſtices of gaol-delivery by virtue of the "ſtatute of 14 *H. VI. cap.* 1."

"But if there were any queſtion upon that ſtatute, yet the "ſtatute of 6 *H. VIII. cap.* 6. which extends to all juſtices and "commiſſioners as well of thoſe of gaol-delivery and of the "peace, enables the court of king's bench to ſend to them the

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THERE can be no doubt but that this mode of proſecution, by information, (or ſuggeſtion,) filed on record by the king's attorney general, or by his coroner or maſter of the crown-office in the court of king's bench, is as antient as the common law itſelf[b]. For as the king was bound to proſecute, or at leaſt to lend the ſanction of his name to a proſecutor, whenever a grand jury informed him upon their oaths that there was a ſufficient ground for inſtituting a criminal ſuit; ſo, when theſe his immediate officers were otherwiſe ſufficiently aſſured that a man had committed a groſs miſdemeſnor, either perſonally againſt the king or his government, or againſt the public peace and good order, they were at liberty, without waiting for any farther intelligence, to convey that information to the court of king's bench by a ſuggeſtion on record, and to carry on the proſecution in his [310] majeſty's name. But theſe informations (of every kind) are confined by the conſtitutional law to mere miſdemeſnors only: for, wherever any capital offence is charged, the ſame law requires that the accuſation be warranted by the oath of twelve men, before the party ſhall be put to anſwer it. And, as to thoſe offences, in which informations were allowed as well as indictments, ſo long as they were confined to this high and reſpectable juriſdiction, and were carried on in a legal and regular courſe in his majeſty's court of king's bench, the ſubject had no reaſon to complain. The ſame notice was given, the ſame proceſs was iſſued, the ſame pleas

[b] 1 Show. 118.

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very record itſelf, and by ſpecial writ or mandate to command them to proceed to trial and judgment, upon ſuch iſſue joined; as they may command the juſtices, before whom the indictment was taken, to proceed to hear and determine the ſame, if no ſuch iſſue were joined." See Sir Miles Stapleton's caſe, *Raym.* 367.

If the treaſon or felony is to be tried at *niſi prius* under the 14 *Hen. VI. c.* 1. then the court ſends a tranſcript of the record, and not the record itſelf. 2 *Hal. P. C.* 3. 14 *Co.* 74.

were

were allowed, the ſame trial by jury was had, the ſame judgment was given by the ſame judges, as if the proſecution had originally been by indictment. But when the ſtatute 3 Hen. VII. c. 1. had extended the juriſdiction of the court of ſtar-chamber, the members of which were the ſole judges of the law, the fact, and the penalty; and when the ſtatute 11 Hen. VII. c. 3. had permitted informations to be brought by any informer upon any penal ſtatutes, not extending to life or member, at the aſſiſes or before the juſtices of the peace, who were to hear and determine the ſame according to their own diſcretion; then it was, that the legal and orderly juriſdiction of the court of king's bench fell into diſuſe and oblivion, and Empſon and Dudley (the wicked inſtruments of king Henry VII.) by hunting out obſolete penalties, and this tyrannical mode of proſecution, with other oppreſſive devices [c], continually haraſſed the ſubject and ſhamefully enriched the crown. The latter of theſe acts was ſoon indeed repealed by ſtatute 1 Hen. VIII. c. 6. but the court of ſtar-chamber continued in high vigour, and daily increaſing it's authority, for more than a century longer; till finally aboliſhed by ſtatute 16 Car. I. c. 10.

Upon this diſſolution the old common law [d] authority of the court of king's bench, as the *cuſtos morum* of the nation, being found neceſſary to reſide ſomewhere for the peace and good government of the kingdom, was again revived in prac-
[311] tice [e]. And it is obſervable, that in the ſame act of parliament which aboliſhed the court of ſtar-chamber, a conviction by information is expreſsly reckoned up, as one of the legal modes of conviction of ſuch perſons as ſhould offend a third time againſt the proviſions of that ſtatute [f]. It is true, ſir Matthew Hale, who preſided in this court ſoon after the time of ſuch revival, is ſaid [g] to have been no friend to this method of proſecution: and, if ſo, the reaſon of ſuch

[c] 1 And. 157.
[d] 5 Mod. 464.
[e] Styl. Rep. 217. 245. Styl. pract. Reg. tit. Information. pag. 187. (edit. 1657.) 2 Sid. 71. 1 Sid. 152.
[f] Stat. 16 Car. I. c. 10. §. 6.
[g] 5 Mod. 460.

his

his diſlike was probably the ill uſe which the maſter of the crown-office then made of his authority, by permitting the ſubject to be haraſſed with vexatious informations, whenever applied to by any malicious or revengeful proſecutor; rather than his doubt of their legality, or propriety upon urgent occaſions[h]. For the power of filing informations, without any control, then reſided in the breaſt of the maſter; and, being filed in the name of the king, they ſubjected the proſecutor to no coſts, though on trial they proved to be groundleſs. This oppreſſive uſe of them, in the times preceding the revolution, occaſioned a ſtruggle, ſoon after the acceſſion of king William[i], to procure a declaration of their illegality by the judgment of the court of king's bench. But ſir John Holt, who then preſided there, and all the judges, were clearly of opinion, that this proceeding was grounded on the common law, and could not be then impeached. And, in a few years afterwards, a more temperate remedy was applied in parliament, by ſtatute 4 & 5 W. & M. c. 18. which enacts, that the clerk of the crown ſhall not file any information without expreſs direction from the court of king's bench: and that every proſecutor, permitted to promote ſuch information, ſhall give ſecurity by a recognizance of twenty pounds (which now ſeems to be too ſmall a ſum) to proſecute the ſame with effect; and to pay coſts to the defendant, in caſe he be acquitted thereon, unleſs the judge, who tries the information, ſhall certify there was reaſonable cauſe for filing it; and, at all events, to pay coſts, unleſs the information ſhall be tried within a year after iſſue joined. [312] But there is a proviſo in this act, that it ſhall not extend to any other informations than thoſe which are exhibited by the maſter of the crown-office: and, conſequently, informations at the king's own ſuit, filed by his attorney general, are no way reſtrained thereby.

THERE is one ſpecies of informations, ſtill farther regulated by ſtatute 9 Ann. c. 20. *viz.* thoſe in the nature of a

[h] 1 Saund. 301. 1 Sid. 174.

[i] M. 1 W. & M. 5 Mod. 459. Comb. 141. Far. 361. 1 Show. 106.

writ of *quo warranto*: which was shewn, in the preceding volume[k], to be a remedy given to the crown against such as had usurped or intruded into any office or franchise. The modern information tends to the same purpose as the ancient writ, being generally made use of to try the civil rights of such franchises; though it is commenced in the same manner as other informations are, by leave of the court, or at the will of the attorney general: being properly a criminal prosecution, in order to fine the defendant for his usurpation, as well as to oust him from his office; yet usually considered at present as merely a civil proceeding (4).

THESE are all the methods of prosecution at the suit of the king. There yet remains another, which is merely at the suit of the subject, and is called an *appeal*.

IV. AN appeal, in the sense wherein it is here used, does not signify any complaint to a superior court of an injustice done by an inferor one, which is the general use of the word; but it here means an original suit, at the time of it's first commencement[l]. An appeal therefore, when spoken of as a criminal prosecution, denotes an accusation by a private subject against another, for some heinous crime; demanding punishment on account of the particular injury suffered, rather than for the offence against the public. As this method of prosecution is still in force, I cannot omit to mention it: but as it is very little in use, on account of the
[313] great nicety required in conducting it, I shall treat of it very

[k] See Vol. III. pag. 262.

[l] It is derived from the French, "*appeller*," the verb active, which signifies to call upon, summon, or challenge one; and not the verb neuter, which signifies the same as the ordinary sense of "appeal" in English.

(4) Because an information in the nature of a *quo warranto* is considered merely as a civil proceeding, the court of king's bench will grant a new trial, though the verdict should have been given for the defendant. 2 *T. R.* 484.

briefly;

briefly; referring the ſtudent for more particulars to other more voluminous compilations [m].

This private proceſs, for the puniſhment of public crimes, had probably its original in thoſe times when a private pecuniary ſatisfaction, called a *weregild*, was conſtantly paid to the party injured, or his relations, to expiate enormous offences. This was a cuſtom derived to us, in common with other northern nations [n], from our anceſtors, the antient Germans; among whom, according to Tacitus [o], "*luitur homicidium certo armentorum ac pecorum numero; recipitque ſatisfactionem univerſa domus* [p]." In the ſame manner by the Iriſh Brehon law, in caſe of murder, the Brehon or judge was uſed to compound between the murderer and the friends of the deceaſed who proſecuted him, by cauſing the malefactor to give unto them, or to the child or wife of him that was ſlain, a recompenſe which they called an *eriach* [q]. And thus we find in our Saxon laws (particularly thoſe of king Athelſtan [r]) the ſeveral weregilds for homicide eſtabliſhed in progreſſive order, from the death of the ceorl or peaſant, up to that of the king himſelf [s]. And in the laws of king Henry I. [t], we have an account of what other offences were then redeemable by weregild, and what were not ſo [u]. As therefore, during the continuance of this cuſ-

[m] 2 Hawk. P. C. ch. 23.

[n] Stiernh. *de jure Sueon. l.* 3. *c.* 4.

[o] *De M. G. c.* 21.

[p] And in another place. (*c.* 12.) "*Delictis, pro modo poenarum, equorum pecorumque numero convicti multantur. Pars multae regi vel civitati; pars ipſi qui vindicatur, vel propinquis ejus exſolvitur.*"

[q] Spenſer's ſtate of Ireland, pag. 1513. *edit.* Hughes.

[r] *Judic. Civit. Lund.* Wilk. 71.

[s] The weregild of a ceorl was 266 thryſmas, that of the king 30,000; each thryſma being equal to about a ſhilling of our preſent money. The weregild of a ſubject was paid entirely to the relations of the party ſlain; but that of the king was divided; one half being paid to the public, the other to the royal family.

[t] c. 12.

[u] In Turkey this principle is ſtill carried ſo far, that even murder is never proſecuted by the officers of the government, as with us. It is the buſineſs of the next relations, and them only, to revenge the ſlaughter of their kinſmen: and if they rather chooſe (as they generally do) to compound the matter for money, nothing more is ſaid about it. (Lady M. W. Montague, lett. 42.)

tom, a proceſs was certainly given, for recovering the were-gild by the party to whom it was due; it ſeems, that, when
[314] theſe offences by degrees grew no longer redeemable, the private proceſs was ſtill continued, in order to inſure the infliction of puniſhment upon the offender, though the party injured was allowed no pecuniary compenſation for the offence.

BUT, though appeals were thus in the nature of proſecutions for ſome atrocious injury committed more immediately againſt an individual, yet it alſo was antiently permitted, that any ſubject might appeal another ſubject of high-treaſon, either in the courts of common law [w], or in parliament, or (for treaſons committed beyond the ſeas) in the court of the high conſtable and marſhal. The cognizance of appeals in the latter ſtill continues in force; and ſo late as 1631 there was a trial by battel awarded in the court of chivalry, on ſuch an appeal of treaſon [x]: but that in the firſt was *virtually* aboliſhed [y] by the ſtatutes 5 Edw. III. c. 9. and 25 Edw. III. c. 24. and in the ſecond *expreſsly* by ſtatute 1 Hen. IV. c. 14. So that the only appeals now in force, for things done within the realm, are appeals of felony and mayhem.

AN appeal of *felony* may be brought for crimes committed either againſt the parties themſelves, or their relations. The crimes againſt the parties themſelves are *larciny*, *rape*, and *arſon*. And for theſe, as well as for mayhem, the perſons robbed, raviſhed, maimed, or whoſe houſes are burnt, may inſtitute this private proceſs. The only crime againſt one's relation, for which an appeal can be brought, is that of *killing* him, by either murder or manſlaughter. But this cannot be brought by every relation; but only by the wife for the death of her huſband, or by the heir male for the death of his anceſtor; which heirſhip was alſo confined, by an ordinance of king Henry the firſt, to the four neareſt degrees

[w] Britt. c. 22.

[x] By Donald lord Rae againſt David Ramſey. (Ruſhw. vol. 2. part 2. p. 112.)

[y] 1 Hal. P. C. 249.

of

of blood[a]. It is given to the wife, on account of the loſs of her huſband: therefore, if ſhe marries again, before or pending her appeal, it is loſt and gone; or, if ſhe marries after judgment, ſhe ſhall not demand execution. The heir, as was ſaid, muſt alſo be heir male, and ſuch a one as was the next heir by the courſe of the common law, at the time of [315] the killing of the anceſtor. But this rule has three exceptions: 1. If the perſon killed leaves an innocent wife, ſhe only, and not the heir, ſhall have the appeal: 2. If there be no wife, and the heir be accuſed of the murder, the perſon, who next to him would have been heir male, ſhall bring the appeal: 3. If the wife kills her huſband, the heir may appeal her of the death. And, by the ſtatute of Glouceſter, 6 Edw. I. c. 9. all appeals of death muſt be ſued within a year and a day after the completion of the felony by the death of the party: which ſeems to be only declaratory of the old common law; for in the Gothic conſtitutions we find the ſame "*praeſcriptio annalis, quae currit adverſus actorem, ſi de homicidio ei non conſtet intra annum a caede facta, nec quemquam interea arguat et accuſet*[a]."

THESE appeals may be brought, previous to any indictment: and if the appellee be acquitted thereon, he cannot be afterwards indicted for the ſame offence. In like manner as by the old Gothic conſtitution, if any offender gained a verdict in his favour, when proſecuted by the party injured, he was alſo underſtood to be acquitted of any crown proſecution for the ſame offence[b]: but, on the contrary, if he made his peace with the king, ſtill he might be proſecuted at the ſuit of the party. And ſo, with us, if a man be acquitted on an indictment of murder, or found guilty, and pardoned by the king, ſtill he ought not (in ſtrictneſs) to go at large, but be impriſoned or let to bail till the year and day be paſt, by virtue of the ſtatute 3 Hen. VII. c. 1. in order to be forthcoming to anſwer any appeal for the ſame felony,

[a] Mirr. c. 2. § 7. [b] *Ibid. l.* 1. *c.* 5.
[a] Stiernh. *de jure Goth. l.* 3. *c.* 4.

not having as yet been punished for it: though, if he hath been found guilty of manslaughter on an indictment, and hath had the benefit of clergy, and suffered the judgment of the law, he cannot afterwards be appealed; for it is a maxim in law, "that *nemo bis punitur pro eodem delicto*." Before this statute was made, it was not usual to indict a man for homicide within the time limited for appeals; which produced very great inconvenience, of which more hereafter [c].

[316] IF the appellee be acquitted, the appellor (by virtue of the statute of Westm. 2. 13 Edw. I. c. 12.) shall suffer one year's imprisonment, and pay a fine to the king, besides restitution of damages to the party for the imprisonment and infamy which he has sustained: and, if the appellor be incapable to make restitution, his abettors shall do it for him, and also be liable to imprisonment. This provision, as was foreseen by the author of Fleta [d], proved a great discouragement to appeals; so that thenceforward they ceased to be in common use.

IF the appellee be found guilty, he shall suffer the same judgment, as if he had been convicted by indictment: but with this remarkable difference; that on an indictment, which is at the suit of the king, the king may pardon and remit the execution; on an appeal, which is at the suit of a private subject, to make an atonement for the private wrong, the king can no more pardon it, than he can remit the damages recovered on an action of battery [e]. In like manner as, while the weregild continued to be paid as a fine for homicide, it could not be remitted by the king's authority [f]. And the antient usage was, so late as Henry the fourth's time, that all the relations of the slain should drag the appellee to the place of execution [g]: a custom, founded upon that savage spirit of family resentment, which prevailed universally through Europe after the irruption of the northern nations, and is peculiarly attended to in their several

[c] See pag. 335.
[d] *l.* 1. *c.* 34. § 48.
[e] 2 Hawk. P. C. 392.
[f] *LL. Edm.* § 3.
[g] *M.* 11 *Hen. IV.* 12. 3 Inst. 131.

codes

codes of law; and which prevails even now among the wild and untutored inhabitants of America: as if the finger of nature had pointed it out to mankind, in their rude and uncultivated state[h]. However, the punishment of the offender may be remitted and discharged by the concurrence of all parties interested; and as the king by his pardon may frustrate an indictment, so the appellant by his release may discharge an appeal[i]: "*nam quilibet potest renunciare juri pro* [317] "*se introducto*(5)."

THESE are the several methods of prosecution instituted by the laws of England for the punishment of offences; of which that by indictment is the most general. I shall therefore confine my subsequent observations principally to this method of prosecution; remarking by the way the most material variations that may arise, from the method of proceeding by either information or appeal.

[h] Robertson's Cha. V. i. 45. [i] 1 Hal. P. C. 9.

(5) Some appeals of late years have been commenced, but not prosecuted with effect. 5 *Burr.* 2643. They have probably been compromised, as the chief object of an appeal in all times was to compel the defendant to make a pecuniary compensation. For when the verdict in an appeal was given in favour of the appellant, he might insist upon what terms he pleased as the ransom of the defendant's life, or a commutation of the sentence. In an appeal, in which the defendant was found guilty of manslaughter, it was doubted whether the king could pardon the burning in the hand, and the defendant compounded with the appellant for 40 marks. 3 *P. Wms.* 453.

CHAPTER THE TWENTY-FOURTH.

OF PROCESS UPON AN INDICTMENT.

WE are next, in the fourth place, to inquire into the manner of iſſuing *proceſs*, after indictment found, to bring in the accuſed to anſwer it. We have hitherto ſuppoſed the offender to be in cuſtody before the finding of the indictment; in which caſe he is immediately (or as ſoon as convenience permits) to be arraigned thereon. But if he hath fled, or ſecretes himſelf, in capital caſes; or hath not, in ſmaller miſdemeſnors, been bound over to appear at the aſſiſes or ſeſſions, ſtill an indictment may be preferred againſt him in his abſence; ſince, were he preſent, he could not be heard before the grand jury againſt it. And, if it be found, then proceſs muſt iſſue to bring him into court; for the indictment cannot be tried, unleſs he perſonally appears: according to the rules of equity in all caſes, and the expreſs proviſion of ſtatute 28 Edw. III. c. 3. in capital ones, that no man ſhall be put to death, without being brought to anſwer by due proceſs of law.

THE proper proceſs on an indictment for any petit miſdemeſnor, or on a penal ſtatute, is a writ of *venire facias*, which is in the nature of a ſummons to cauſe the party to appear. And if by the return to ſuch *venire* it appears, that the party hath lands in the county whereby he may be diſtreined, then a *diſtreſs infinite* ſhall be iſſued from time to time till he appears.

pears. But if the sheriff returns that he hath no lands in his bailiwick, then (upon his non-appearance) a writ of *capias* shall issue, which commands the sheriff to take his body, and [319] have him at the next assises; and if he cannot be taken upon the first *capias*, a second, and a third shall issue, called an *alias*, and a *pluries capias*. But, on indictments for treason or felony, a *capias* is the first process; and for treason or homicide, only one shall be allowed to issue[a], or two in the case of other felonies, by statute 25 Edw. III. c. 14. though the usage is to issue only one in any felony; the provisions of this statute being in most cases found impracticable[b]. And so, in the case of misdemesnors, it is now the usual practice for any judge of the court of king's bench, upon certificate of an indictment found, to award a writ of *capias* immediately, in order to bring in the defendant. But if he absconds, and it is thought proper to pursue him to an outlawry, then a greater exactness is necessary. For, in such case, after the several writs have issued in a regular number, according to the nature of the respective crimes, without any effect, the offender shall be put in the *exigent* in order to his outlawry: that is, he shall be exacted, proclaimed, or required to surrender, at five county courts; and if he be returned *quinto exactus*, and does not appear at the fifth exaction or requisition, then he is adjudged to be *outlawed*, or put out of the protection of the law; so that he is incapable of taking the benefit of it in any respect, either by bringing actions or otherwise.

THE punishment, for outlawries upon indictments for misdemesnors, is the same as for outlawries upon civil actions; (of which, and the previous process by writs of *capias*, *exigi facias*, and *proclamation* we spoke in the preceding book[c];) viz. forfeiture of goods and chattels. But an outlawry in treason or felony amounts to a conviction and attainder of the offence charged in the indictment, as much as if the offender

[a] See Append. § 1.
[b] 2 Hal. P. C. 193.
[c] See Vol. III. p. 283, 4.

had been found guilty by his country [d] (1). His life is however ſtill under the protection of the law, as hath formerly been
[320] obſerved [e]: ſo that though antiently an outlawed felon was ſaid to have *caput lupinum*, and might be knocked on the head like a wolf, by any one that ſhould meet him [f]; becauſe, having renounced all law, he was to be dealt with as in a ſtate of nature, when every one that ſhould find him might ſlay him: yet now, to avoid ſuch inhumanity, it is holden that no man is entitled to kill him wantonly or wilfully; but in ſo doing is guilty of murder [g], unleſs it happens in the endeavour to apprehend him [h]. For any perſon may arreſt an outlaw on a criminal proſecution, either of his own head, or by writ or warrant of *capias utlagatum*, in order to bring him to execution. But ſuch outlawry may be frequently reverſed by writ of error; the proceedings therein being (as it is fit they ſhould be) exceedingly nice and circumſtantial; and, if any ſingle minute point be omitted or miſconducted, the whole outlawry is illegal, and may be reverſed: upon which reverſal the party accuſed is admitted to plead to, and defend himſelf againſt, the indictment.

THUS much for proceſs to bring in the offender after indictment found: during which ſtage of the proſecution it is, that writs of *certiorari facias* are uſually had, though they may be had at any time before trial, to certify and remove the indictment, with all the proceedings thereon, from any inferior court of criminal juriſdiction into the court of king's bench, which is the ſovereign ordinary court of juſtice in cauſes cri-

[d] 2 Hal. P. C. 205.
[e] See pag. 178.
[f] Mirr. c. 4. § 4. Co. Litt. 128.
[g] 1 Hal. P. C. 497.
[h] Bracton. *fol.* 125.

(1) In moſt caſes now in which a perſon convicted by a verdict is deprived of clergy, a perſon outlawed will alſo be ouſted of clergy, yet ſome few inſtances may perhaps ſtill remain where a perſon outlawed will have clergy, though if he had been tried for the ſame offence, he would have been capitally convicted. See *Foſter*, 358. 2 *Leach. Hawk.* 481. 4 *T. R.* 543.

minal.

minal. And this is frequently done for one of theſe four purpoſes; either, 1. To conſider and determine the validity of appeals or indictments and the proceedings thereon; and to quaſh or confirm them as there is cauſe: or, 2. Where it is ſurmiſed that a partial or inſufficient trial will probably be had in the court below, the indictment is removed, in order to have the priſoner or defendant tried at the bar of the court of king's bench, or before the juſtices of *niſi prius*: or, 3. It is ſo removed, in order to plead the king's pardon there: or, 4. To iſſue proceſs of outlawry againſt the offender, in thoſe counties or places where the proceſs of the inferior judges will [321] not reach him[i]. Such writ of *certiorari*, when iſſued and delivered to the inferior court for removing any record or other proceeding, as well upon indictment as otherwiſe, ſuperſedes the juriſdiction of ſuch inferior court, and makes all ſubſequent proceedings therein entirely erroneous and illegal; unleſs the court of king's bench remands the record to the court below, to be there tried and determined. A *certiorari* may be granted at the inſtance of either the proſecutor or the defendant: the former as a matter of right, the latter as a matter of diſcretion; and therefore it is ſeldom granted to remove indictments from the juſtices of gaol delivery, or after iſſue joined or confeſſion of the fact in any of the courts below[k].

At this ſtage of proſecution alſo it is, that indictments found by the grand jury againſt a peer muſt in conſequence of a writ of *certiorari* be certified and tranſmitted into the court of parliament, or into that of the lord high ſteward of Great Britain; and that, in places of excluſive juriſdiction, as the two univerſities, indictments muſt be delivered (upon challenge and claim of cognizance) to the courts therein eſtabliſhed by charter, and confirmed by act of parliament, to be there reſpectively tried and determined.

[i] 2 Hal. P. C. 210. [k] 2 Hawk. P. C. 287. 4 Burr. 749.

CHAPTER THE TWENTY-FIFTH.

OF ARRAIGNMENT AND IT'S INCIDENTS.

WHEN the offender either appears voluntarily to an indictment, or was before in custody, or is brought in upon criminal process to answer it in the proper court, he is immediately to be *arraigned* thereon; which is the fifth stage of criminal prosecution.

To arraign, is nothing else but to call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment[a] (1). The prisoner is to be called to the bar by his name; and it is laid down in our antient books[b], that though under an indictment of the highest nature, he must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape, and then he may be secured with irons. But yet in Layer's case, *A. D.* 1722, a difference was taken between the time of arraignment, and the time of trial; and accordingly the prisoner stood at the bar in chains during the time of his arraignment[c] (2).

[a] 2 Hal. P. C. 216.

[b] Bract. *l.* 3. *de coron. c.* 18. § 3. Mirr. *c.* 5. *sect.* 1. § 54. Flet. *l.* 1. *c.* 31. § 2. Edit. *c.* 5. Staundf. P. C. 78. 3 Inst. 34. Kal. 30. 2 Hal. P. C. 219. 2 Hawk. P. C. 308.

[c] State Trials. VI. 230.

(1) This word in Latin (Lord Hale says) is no other than *ad rationem ponere*, and in French *ad reson*, or abbreviated *a reso*. 2 H. P. C. 216.

(2) And it has since been held that the court has no authority to order the irons to be taken off, till the prisoner has pleaded, and the jury are charged to try him. *Waite's* Case, *Leach*, 34.

WHEN

When he is brought to the bar, he is called upon by name to hold up his hand: which though it may seem a trifling circumstance, yet is of this importance, that by the holding up of his hand *constat de persona*, and he owns himself to be of that name by which he is called [4]. However, it is not an indispensable ceremony; for, being calculated merely for the purpose of identifying the person, any other acknowlegement will answer the purpose as well: therefore, if the prisoner obstinately and contemptuously refuses to hold up his hand, but confesses he is the person named, it is fully sufficient [5].

Then the indictment is to be read to him distinctly in the English tongue, (which was law, even while all other proceedings were in Latin,) that he may fully understand his charge. After which it is to be demanded of him, whether he be guilty of the crime whereof he stands indicted, or not guilty. By the old common law the accessory could not be arraigned till the principal was attainted; unless he chose it, for he might waive the benefit of the law: and therefore principal and accessory might, and may still, be arraigned, and plead, and also be tried together. But otherwise, if the principal had never been indicted at all, and stood mute, had challenged above thirty-five jurors peremptorily, had claimed the benefit of clergy, had obtained a pardon, or had died before attainder, the accessory in any of these cases could not be arraigned: for *non constitit* whether any felony was committed or no, till the principal was attainted; and it might so happen that the accessory should be convicted one day, and the principal acquitted the next, which would be absurd. However, this absurdity could only happen, where it was possible, that a trial of the principal might be had, subsequent to that of the accessory: and therefore the law still continues that the accessory shall not be tried, so long as the principal remains liable to be tried hereafter. But by statute

[4] 2 Hal. P. C. 219. [5] Raym. 408.

1 Ann. c. 9. if the principal be once convicted, and before attainder, (that is, before he receives judgment of death or outlawry,) he is delivered by pardon, the benefit of clergy, or otherwise; or if the principal ſtands mute, or challenges peremptorily above the legal number of jurors, ſo as never to be convicted at all; in any of theſe caſes, in which no ſubſequent trial can be had of the principal, the acceſſory may be proceeded againſt, as if the principal felon had been attainted: for there is no danger of future contradiction. And upon the trial of the acceſſory, as well after as before the conviction of the principal, it ſeems to be the better opinion, and founded on the true ſpirit of juſtice [f], that the acceſſory is at liberty (if he can) to controvert the guilt of his ſuppoſed principal, and to prove him innocent of the charge, as well as point of fact as in point of law.

WHEN a criminal is arraigned, he either *ſtands mute*, or *confeſſes* the fact; which circumſtances we may call *incidents* to the arraignment: or elſe he *pleads* to the indictment, which is to be conſidered as the next ſtage of proceedings. But firſt, let us obſerve theſe incidents to the arraignment, of ſtanding mute, or confeſſion.

I. REGULARLY a priſoner is ſaid to ſtand mute, when, being arraigned for treaſon or felony, he either, 1. Makes no anſwer at all: or, 2. Anſwers foreign to the purpoſe, or with ſuch matter as is not allowable; and will not anſwer otherwiſe: or, 3. Upon having pleaded not guilty, refuſes to put himſelf upon the country [g]. If he ſays nothing, the court ought *ex officio* to impanel a jury to inquire whether he ſtands obſtinately mute, or whether he be dumb *ex viſitatione Dei*. If the latter appears to be the caſe, the judges of the court (who are to be of counſel for the priſoner, and to ſee that he hath law and juſtice) ſhall proceed to the trial, and examine all points as if he had pleaded not guilty [h]. But whether judgment of death can be given againſt ſuch a priſoner,

[f] Foſter, 365, &c.
[g] 2 Hal. P. C. 316.
[h] 2 Hawk. P. C. 327.

ſoner, who hath never pleaded, and can ſay nothing in arreſt of judgment, is a point yet undetermined [i].

If he be found to be obſtinately mute, (which a priſoner hath been held to be, that hath cut out his own tongue [k],) then, if it be on an indictment of high treaſon, it hath long been clearly ſettled, that ſtanding mute is an equivalent to a conviction, and he ſhall receive the ſame judgment and execution [l]. And as in this the higheſt crime, ſo alſo in the loweſt ſpecies of felony, *viz.* in petit larciny, and in all miſdemeſnors, ſtanding mute hath always been equivalent to conviction. But upon appeals or indictments for other felonies, or petit treaſon, the priſoner was not, by the antient law, looked upon as convicted, ſo as to receive judgment for the felony; but ſhould, for his obſtinacy, have received the terrible ſentence of *penance*, or *peine* (which, as will appear preſently, was probably nothing more than a corrupted abbreviation of *priſone*) *forte et dure*.

Before this was pronounced the priſoner had not only *trina admonitio*, but alſo a reſpite of a few hours, and the ſentence was diſtinctly read to him, that he might know his danger [m]: and, after all, if he continued obſtinate, and his offence was clergyable, he had the benefit of his clergy allowed him, even though he was too ſtubborn to pray it [n]. Thus tender was the law of inflicting this dreadful puniſhment: but if no other means could prevail, and the priſoner (when charged with a capital felony) continued ſtubbornly mute, the judgment was then given againſt him, without any diſtinction of ſex or degree. A judgment, which was purpoſely ordained to be exquiſitely ſevere, that by that very means it might rarely be put in execution (3).

[i] 2 Hal. P. C. 317.
[k] 3 Inſt. 178.
[l] 2 Hawk. P. C. 329. 2 Hal. P. C. 317.
[m] 2 Hal. P. C. 320.
[n] 2 Hal. P. C. 321. 2 Hawk. P. C. 332.

(3) Aulus Gellius with more truth has made the ſame obſervation upon the cruel law of the Twelve Tables *De inope debitore ſecando*, "*Eo conſilio tanta immanitas pœnæ denunciata eſt, ne ad eam unquam*

THE rack, or question, to extort a confession from criminals, is a practice of a different nature: *this* having been only
[326] used to compel a man to put himself upon his trial; *that* being a species of trial in itself. And the trial by rack is utterly unknown to the law of England; though once, when the dukes of Exeter and Suffolk, and other ministers of Henry VI. had laid a design to introduce the civil law into this kingdom as the rule of government, for a beginning thereof they erected a rack for torture; which was called in derision the duke of Exeter's daughter, and still remains in the tower of London[o]: where it was occasionally used as an engine of state, not of law, more than once in the reign of queen Elizabeth[p]. But when, upon the assassination of Villiers duke of Buckingham by Felton, it was proposed in the privy council to put the assassin to the rack, in order to discover his accomplices; the judges, being consulted, declared unanimously, to their own honour and the honour of the English law, that no such proceeding was allowable by the laws of England[q]. It seems astonishing that this usage, of administering the torture, should be said to arise from a tenderness to the lives of men: and yet this is the reason given for it's introduction in the civil law, and it's subsequent adoption by the French and other foreign nations[r]: *viz.* because the laws cannot endure that any man should die upon the evidence of a false, or even a single witness; and therefore contrived

[o] 3 Inst. 35.
[p] Baxt. 92. 496.
[q] Rushw. Coll. i. 638.
[r] *Cod. l.* 9. *t.* 41. *l.* 8. & *t.* 47. *l.* 16. Fortesc. *de LL. Angl. c.* 22.

unquam perveniretur; for he adds, *dissectum esse antiquitus neminem equidem neque legi neque audivi.* lib. 20. c. 1. But with respect to the horrid judgment of the *peine forte et dure*, the prosecutor and the court could exercise no discretion, or shew no favour to a prisoner, who stood obstinately mute. And in the legal history of this country there are numerous instances of persons, who have had resolution and patience to undergo so terrible a death, in order to benefit their heirs by preventing a forfeiture of their estates, which would have been the consequence of a conviction by a verdict.

this method that innocence should manifeſt itſelf by a ſtout denial, or guilt by a plain confeſſion. Thus rating a man's virtue by the hardineſs of his conſtitution, and his guilt by the ſenſibility of his nerves!—But there needs only to ſtate accurately [s], in order moſt effectually to expoſe this inhuman ſpecies of mercy, the uncertainty of which, as a teſt, and criterion of truth, was long ago very elegantly pointed out by Tully; though he lived in a ſtate wherein it was uſual to torture ſlaves in order to furniſh evidence: "*tamen*, [327] ſays he, "*illa tormenta gubernat dolor, medetur natura ſuo, juſque tum animi tum corporis, regit quaeſitor, flectit libido, corrumpit ſpes, infirmat metus; ut in tot rerum angustiis nihil veritati loci relinquatur*[t]."

THE Engliſh judgment of penance for ſtanding [u] mute was as follows: that the priſoner be remanded to the priſon from whence he came; and put into a low, dark chamber; and there be laid on his back, on the bare floor, naked, unleſs where decency forbids; that there be placed upon his body as great a weight of iron as he could bear, and more: that he have no ſuſtenance, ſave only, on the firſt day, three morſels of the worſt bread; and, on the ſecond day, three draughts of ſtanding water, that ſhould be neareſt to the priſon door; and in this ſituation this ſhould be alternately his daily diet, *till he died*, or (as antiently the judgment ran) *till he anſwered* [w].

IT hath been doubted whether this puniſhment ſubſiſted at the common law [x], or was introduced in conſequence of the ſtatute Weſtm. 1. 3 Edw. I. c. 12. [y] which ſeems to be

[s] The marquis Beccaria, (ch. 16.) in an exquiſite piece of raillery, has propoſed this problem, with a gravity and preciſion that are truly mathematical: "the force of the muſcles and the ſenſibility of the nerves of an innocent perſon being given, it is required to find the degree of pain, neceſſary to make him confeſs himſelf guilty of a given crime."

[t] *Pro Sulla*. 28.

[u] 2 Hal. P. C. 319. 2 Hawk. P. C. 329.

[w] Britton. c. 4. & 22. Flet. l. 1. c. 34. § 33.

[x] 2 Inſt. 179. 2 Hal. P. C. 322. 2 Hawk. P. C. 330.

[y] Staundf. P. C. 149. Barr. 82.

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the better opinion. For not a word of it is mentioned in Glanvil or Bracton, or in any antient author, case, or record, (that hath yet been produced,) previous to the reign of Edward I.: but there are instances on record in the reign of Henry III.[y], where persons accused of felony, and standing mute, were tried in a particular manner, by two successive juries, and convicted; and it is asserted by the judges in 8 Hen. IV. that, by the common law before the statute, standing mute on an appeal amounted to a conviction of the felony[z]. This statute of Edward I. directs such persons
[318] "as will not put themselves upon inquests of felonies before "the judges at the suit of the king, to be put into hard and "strong prison (*foient mys en la prisone fort et dure*) as those "which refuse to be at the common law of the land." And, immediately after this statute, the form of the judgment appears in Fleta and Britton to have been only a very strait confinement in prison, with hardly any degree of sustenance; but no weight is directed to be laid upon the body, so as to hasten the death of the miserable sufferer: and indeed any surcharge of punishment on persons adjudged to penance, so as to shorten their lives, is reckoned by Horne in the[a] mirror as a species of criminal homicide. It also clearly appears, by a record of 31 Edw. III.[b], that the prisoner might then possibly subsist for forty days under this lingering punishment. I should therefore imagine that the practice of loading him with weights, or, as it was usually called, *pressing him to death*, was gradually introduced between 31 Edw. III. and 8 Hen. IV. at which last period it first appears upon our books[c]; being intended as a species of mercy to the delinquent, by delivering him the sooner from his torment: and hence I presume it also was, that the duration of the penance was then first[d] altered; and instead of continuing *till he answered*, it was directed to continue *till he died*, which must very soon happen under an enormous pressure.

[y] Emlyn on 2 Hal. P. C. 322.

[z] *Al common ley, avant le statute de Westm.* 1. c. 12. *si ascun ust estre appeal, et ust estre mute, ill serra convict de felony.* (*M.* 8 *Hen. IV.* 2.)

[a] ch. 1. § 9.

[b] 6 Rym. 13.

[c] Yearb. 8 Hen. IV. 1.

[d] *Et fuit dit, que le contraire avoit estre fait devant ces heurs* (*Ibid.* 2.)

THE uncertainty of it's original, the doubts that were conceived of it's legality, and the repugnance of it's theory (for it rarely was carried into practice) to the humanity of the laws of England, all concurred to require a legiſlative abolition of this cruel proceſs, and a reſtitution of the antient common law; whereby the ſtanding mute in felony, as well as in treaſon and in treſpaſs, amounted to a confeſſion of the charge. Or, if the corruption of the blood and the conſequent eſcheat in felony had been removed, the judgment of *peine forte et dure* might perhaps have ſtill innocently remained, as a monument of the ſavage rapacity with which the lordly [329] tyrants of feodal antiquity hunted after eſcheats and forfeitures; ſince no one would ever have been tempted to undergo ſuch a horrid alternative. For the law was, that by ſtanding mute, and ſuffering this heavy penance, the judgment, and of courſe the corruption of the blood and eſcheat of the *lands*, were ſaved in felony and petit treaſon; though not the forfeiture of the *goods*: and therefore this lingering puniſhment was probably introduced, in order to extort a plea: without which it was held that no judgment of death could be given, and ſo the lord loſt his eſcheat. But in high treaſon, as ſtanding mute is equivalent to a conviction, the ſame judgment, the ſame corruption of blood, and the ſame forfeitures always attended it, as in other caſes of conviction[a]. And very lately, to the honour of our laws, it hath been enacted by ſtatute 12 Geo. III. c. 20. that every perſon who, being arraigned for felony and piracy, ſhall ſtand mute or not anſwer directly to the offence, ſhall be convicted of the ſame; and the ſame judgment and execution (with all their conſequences in every reſpect) ſhall be thereupon awarded, as if the perſon had been convicted by verdict or confeſſion of the crime (4). And thus much for the demeſnor of a priſoner upon

[a] 2 Hawk. P. C. 331.

(4) Two inſtances have occurred ſince the paſſing of this ſtatute of perſons, who refuſed to plead, and who in conſequence were condemned and executed. One was at the Old Bailey for murder

upon his arraignment, by ſtanding mute; which now, in all caſes, amounts to a conſtructive confeſſion.

II. THE other incident to arraignments excluſive of the plea, is the priſoner's actual *confeſſion* of the indictment. Upon a ſimple and plain confeſſion, the court hath nothing to do but to award judgment: but it is uſually very backward in receiving and recording ſuch confeſſion, out of tenderneſs to the life of the ſubject; and will generally adviſe the priſoner to retract it, and plead to the indictment[f].

BUT there is another ſpecies of confeſſion, which we read much of in our antient books, of a far more complicated kind, which is called *approvement*. And that is, when a per-
[330] ſon, indicted of treaſon or felony, and arraigned for the ſame, doth confeſs the fact before plea pleaded; and appeals or accuſes others, his accomplices of the ſame crime, in order to obtain his pardon. In this caſe he is called an *approver* or prover, *probator*, and the party appealed or accuſed is called the *appellee*. Such approvement can only be in capital offences; and it is, as it were, equivalent to an indictment, ſince the appellee is equally called upon to anſwer it: and if he hath no reaſonable and legal exceptions to make to the perſon of the approver, which indeed are very numerous, he muſt put himſelf upon his trial, either by battel, or by the country; and, if vanquiſhed or found guilty, muſt ſuffer the judgment of the law, and the approver ſhall have his

[f] 2 Hal. P. C. 225.

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in 1777, the other was for burglary at the ſummer aſſiſes at Wells in 1792. It might perhaps have been a greater improvement of the law, if the priſoner's ſilence had been conſidered a plea of not guilty, rather than a confeſſion. For it would operate more powerfully as an example, and be more ſatisfactory to the minds of the public, if the priſoner ſhould ſuffer death after a public manifeſtation of his guilt by evidence, than that he ſhould be ordered for execution only from the preſumption which ariſes from his obſtinate ſilence.

pardon

pardon *ex debito juſtitiæ*. On the other hand, if the appellee be conqueror, or acquitted by the jury, the approver ſhall receive judgment to be hanged, upon his own confeſſion of the indictment; for the condition of his pardon has failed, *viz.* the convicting of ſome other perſon, and therefore his conviction remains abſolute.

But it is purely in the diſcretion of the court to permit the approver thus to appeal, or not; and, in fact, this courſe of admitting approvements hath been long diſuſed: for the truth was, as ſir Matthew Hale obſerves, that more miſchief hath ariſen to good men by theſe kind of approvements, upon falſe and malicious accuſations of deſperate villains, than benefit to the public by the diſcovery and conviction of real offenders. And therefore, in the times when ſuch appeals were more frequently admitted, great ſtrictneſs and nicety were held therein: though, ſince their diſcontinuance, the doctrine of approvements is become a matter of more curioſity than uſe. I ſhall only obſerve, that all the good, whatever it be, that can be expected from this method of approvement is fully provided for in the caſe of coining, robbery, burglary, houſe-breaking, horſe-ſtealing, and larceny to the value of five ſhillings from ſhops, warehouſes, ſtables, and coach-houſes, by ſtatutes 4 & 5 W. & M. c. 8. 6 & 7 W. III. c. 17. 10 & 11 W. III. c. 23. and 5 Ann. [331] c. 31. which enact, that if any ſuch offender, being out of priſon, ſhall diſcover two or more perſons, who have committed the like offences, ſo as they may be convicted thereof; he ſhall in caſe of burglary or houſebreaking receive a reward of 40*l.* and in general be entitled to a pardon of all capital offences, excepting only murder and treaſon; and of them alſo in the caſe of coining[b]. And if any ſuch perſon, having feloniouſly ſtolen any lead, iron, or other metals, ſhall diſcover and convict two offenders of having illegally bought or received the ſame, he ſhall by virtue of ſtatute 29 Geo. II.

[a] 2 Hal. P. C. ch. 29. 2 Hawk. P. C. ch. 24.

[b] The pardon, for diſcovering offences againſt the coinage act of 15 Geo. II. c. 28. extends only to all *ſuch* offences.

c. 30. be pardoned for all ſuch felonies committed before ſuch diſcovery (5). It hath alſo been uſual for the juſtices of the peace, by whom any perſons charged with felony are committed to gaol, to admit ſome one of their accomplices to become a witneſs (or, as it is generally termed, king's evidence) againſt his fellows; upon an implied confidence, which the judges of gaol delivery have uſually countenanced and adopted, that if ſuch accomplice makes a full and complete diſcovery of that and of all other felonies to which he is examined by the magiſtrate, and afterwards gives his evidence without prevarication or fraud, he ſhall not himſelf be proſecuted for that or any other previous offence of the ſame degree [1] (6).

[1] The King v. Rudd; Mich. 16 Geo. III. on a caſe reſerved from the Old Bailey, Oct. 1775.

(5) The perſons deſcribed in the above ſtatutes, and alſo thoſe perſons to whom the king, by ſpecial proclamation in the gazette or otherwiſe, has promiſed his pardon, lord Mansfield ſays have a right to a pardon. *Cowp.* 334.

(6) In the caſe of Mrs. Rudd, in which this ſubject is clearly and ably explained by lord Mansfield, and again by Mr. J. Aſton, in delivering the opinion of all the judges, (*Cowp.* 331.) it is laid down that no authority is given to a juſtice of peace to pardon an offender, and to tell him he ſhall be a witneſs at all events againſt others. But where the evidence appears inſufficient to convict two or more without the teſtimony of one of them, the magiſtrate may encourage a hope that he, who will behave fairly and diſcloſe the whole truth and bring the others to juſtice, ſhall himſelf eſcape puniſhment. But this diſcretionary power exerciſed by the juſtices of peace is founded in practice only, and cannot controul the authority of the court of gaol delivery, and exempt at all events the accomplice from being proſecuted. A motion is always made to the judge for leave to admit an accomplice to be a witneſs, and unleſs he ſhould ſee ſome particular reaſon for a contrary conduct, he will prefer the one to whom this encouragement has been given by the juſtice of peace. This admiſſion to be a witneſs amounts to a promiſe of a recommendation to mercy, upon condition that the accomplice makes a full and fair diſcloſure of all the circumſtances of

of the crime for which the other prisoners are tried, and in which he has been concerned in concert with them. Upon failure on his part with this condition, he forfeits all claim to protection. And upon a trial some years ago at York, before Mr. J. Buller, the accomplice, who was admitted a witness, denied in his evidence all that he had before confessed, upon which the prisoner was acquitted; but the judge ordered an indictment to be preferred against this accomplice for the same crime, and upon his previous confession, and other circumstances, he was convicted and executed. And if the jury were satisfied with his guilt, there can be no question with regard both to the law and justice of the case.

The learned commentator says, that the accomplice thus admitted a witness, shall not afterwards be prosecuted for that or *any other previous offence of the same degree*. Mrs. Rudd's case does not warrant the extent of that position, for the decision of that case, and what is advanced by Mr. J. Aston, (*Cowp.* 341.) and as the editor conceives the reason and principles of this doctrine, will not extend the claim of the witness to mercy beyond those offences in which he has been connected with the prisoners, and concerning which he has previously undergone an examination,

c. 30. be pardoned for all ſuch felonies committed before ſuch diſcovery (5). It hath alſo been uſual for the juſtices of the peace, by whom any perſons charged with felony are committed to gaol, to admit ſome one of their accomplices to become a witneſs (or, as it is generally termed, king's evidence) againſt his fellows; upon an implied confidence, which the judges of gaol delivery have uſually countenanced and adopted, that if ſuch accomplice makes a full and complete diſcovery of that and of all other felonies to which he is examined by the magiſtrate, and afterwards gives his evidence without prevarication or fraud, he ſhall not himſelf be proſecuted for that or any other previous offence of the ſame degree [1] (6).

[1] The King v. Rudd; Mich. 16 Geo. III. on a caſe reſerved from the Old Bailey, Oct. 1775.

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335. [c] 2 Hal. P. C. 256.
[d] *Ibid.* 256.

CHAPTER THE TWENTY-SIXTH.

OF PLEA AND ISSUE.

WE are now to consider the plea of the prisoner, or defensive matter alleged by him on his arraignment, if he does not confess, or stand mute. This is either, 1. A plea to the jurisdiction; 2. A demurrer; 3. A plea in abatement; 4. A special plea in bar; or, 5. The general issue.

FORMERLY there was another plea, now abrogated, that of *sanctuary*; which is however necessary to be lightly touched upon, as it may give some light to many parts of our antient law: it being introduced and continued during the superstitious veneration that was paid to consecrated ground in the times of popery. First then, it is to be observed, that if a person accused of any crime (except treason, wherein the crown, and sacrilege, wherein the church, was too nearly concerned) had fled to any church or church-yard, and within forty days after went in sackcloth and confessed himself guilty before the coroner, and declared all the particular circumstances of the offence; and thereupon took the oath in that case provided, *viz.* that he abjured the realm, and would depart from thence forthwith, at the port that should be assigned him, and would never return without leave from the king; he by this means saved his life, if he observed the conditions of the oath, by going with a cross in
[333] his hand and with all convenient speed, to the port assigned, and embarking. For if, during this forty days privilege of sanctuary, or in his road to the sea-side, he was apprehended and

and arraigned in any court, for this felony, he might plead the privilege of ſanctuary, and had a right to be remanded, if taken out againſt his will[a]. But by this abjuration his blood was attainted, and he forfeited all his goods and chattels[b]. The immunity of theſe privileged places was very much abridged by the ſtatutes 27 Hen. VIII. c. 19. and 32 Hen. VIII. c. 12. And now, by the ſtatute 21 Jac. I. c. 28. all privilege of ſanctuary, and abjuration conſequent thereupon, is utterly taken away and aboliſhed.

FORMERLY alſo the benefit of clergy uſed to be pleaded before trial or conviction, and was called a *declinatory* plea; which was the name alſo given to that of ſanctuary[c]. But, as the priſoner upon a trial has a chance to be acquitted, and totally diſcharged; and, if convicted of a clergyable felony, is entitled equally to his clergy after as before conviction; this courſe is extremely diſadvantageous: and therefore the benefit of clergy is now very rarely pleaded; but, if found requiſite, is prayed by the convict before judgment is paſſed upon him.

I PROCEED therefore to the five ſpecies of pleas, before-mentioned.

I. A PLEA to the *juriſdiction*, is where an indictment is taken before a court, that hath no cognizance of the offence; as if a man be indicted for a rape at the ſheriff's tourn, or for treaſon at the quarter ſeſſions: in theſe, or ſimilar caſes, he may except to the juriſdiction of the court, without anſwering at all to the crime alleged[d].

II. A DEMURRER to the indictment. This is incident to criminal caſes, as well as civil, when the fact as alleged is allowed to be true, but the priſoner joins iſſue upon ſome [334] point of law in the indictment, by which he inſiſts that the fact, as ſtated, is no felony, treaſon, or whatever the crime is

[a] Mirr. c. 2. § 13. 2 Hawk. P. C. 335.
[b] 2 Hawk. P. C. 52.
[c] 2 Hal. P. C. 236.
[d] *Ibid.* 256.

alleged to be. Thus, for instance, if a man be indicted for *feloniously* stealing a greyhound; which is an animal in which no valuable property can be had, and therefore it is not felony, but only a civil trespass, to steal it: in this case the party indicted may demur to the indictment, denying it to be felony, though he confesses the act of taking it. Some have held[e], that if, on demurrer, the point of law be adjudged *against* the prisoner, he shall have judgment and execution, as if convicted by verdict. But this is denied by others[f], who hold, that in such case he shall be directed and received to plead the general issue, not guilty, after a demurrer determined against him. Which appears the more reasonable, because it is clear, that if the prisoner freely discovers the fact in court, and refers it to the opinion of the court, whether it be felony or no; and upon the fact thus shewn it appears to be felony; the court will not record the confession, but admit him afterwards to plead not guilty[g]. And this seems to be a case of the same nature, being for the most part a mistake in point of law, and in the conduct of his pleading; and though a man by mispleading may in some cases lose his property, yet the law will not suffer him by such niceties to lose his life. However, upon this doubt, demurrers to indictments are seldom used: since the same advantages may be taken upon a plea of not guilty: or afterwards in arrest of judgment, when the verdict has established the fact.

III. A PLEA in *abatement* is principally for a *misnomer*, a wrong name, or a false addition to the prisoner. As, if *James* Allen, *gentleman*, is indicted by the name of *John* Allen, *esquire*, he may plead that he has the name of James, and not of John; and that he is a gentleman, and not an esquire. And, if either fact is found by a jury, then the in-
[335] dictment shall be abated, as writs or declarations may be in civil actions; of which we spoke at large in the preceding volume[h]. But, in the end, there is little advantage accru-

[e] 2 Hal. P. C. 257.
[f] 2 Hawk. P. C. 334.
[g] 2 Hal. P. C. 258.
[h] See Vol. III. page 302.

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ing to the prisoner by means of these dilatory pleas; because if this exception be allowed, a new bill of indictment may be framed, according to what the prisoner in his plea avers to be his true name and addition. For it is a rule, upon all pleas in abatement, that he, who takes advantage of a flaw, must at the same time shew how it may be amended. Let us therefore next consider a more substantial kind of plea, viz.

IV. SPECIAL pleas in *bar*; which go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged. These are of four kinds: a former acquittal, a former conviction, a former attainder, or a pardon. There are many other pleas, which may be pleaded in bar of an appeal[1]: but these are applicable to both appeals and indictments.

1. First the plea of *autrefoits acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence[2], he may plead such acquittal in bar of any subsequent accusation for the same crime. Therefore an acquittal on an appeal is a good bar to an indictment on the same offence. And so also was an acquittal on an indictment a good bar to an appeal, by the common law[3]; and therefore, in favour of appeals, a general practice was introduced, not to try any person on an indictment of homicide, till after the year and day, within which appeals may be brought, were past; by which time it often happened that the witnesses died, or the whole was forgotten. To remedy which inconvenience the statute 3 Hen. VII. c. 1. enacts, that indictments shall be proceeded on, immediately, at the king's [336] suit, for the death of a man, without waiting for bringing

[1] 2 Hawk. P. C. ch. 23.
[2] 2 Hawk. P. C. 373.
[3] 3 Mod. 94.

an appeal; and the plea of *autrefoits acquit* on an indictment, shall be no bar to the profecuting of any appeal.

2. SECONDLY, the plea of *autrefoits convict*, or a former conviction for the ſame identical crime, though no judgment was ever given, or perhaps will be, (being ſuſpended by the benefit of clergy or other cauſes,) is a good plea in bar to an indictment. And this depends upon the ſame principle as the former, that no man ought to be twice brought in danger of his life for one and the ſame crime[l]. Hereupon it has been held, that a conviction of manſlaughter, on an appeal or an indictment, is a bar even in another appeal, and much more in an indictment, of murder; for the fact proſecuted is the ſame in both, though the offences differ in colouring and in degree. It is to be obſerved, that the pleas of *autrefoits acquit* and *autrefoits convict*, or a former acquittal, and former conviction, muſt be upon a proſecution for the ſame identical act and crime. But the caſe is otherwiſe, in

3. THIRDLY, the plea of *autrefoits attaint*, or a former attainder; which is a good plea in bar, whether it be for the ſame or any other felony. For wherever a man is attainted of felony, by judgment of death either upon a verdict or confeſſion, by outlawry, or heretofore by abjuration; and whether upon an appeal or an indictment; he may plead ſuch attainder in bar to any ſubſequent indictment or appeal, for the ſame or for any other felony[m]. And this becauſe, generally, ſuch proceeding on a ſecond proſecution cannot be to any purpoſe: for the priſoner is dead in law by the firſt attainder, his blood is already corrupted, and he hath forfeited all that he had: ſo that it is abſurd and ſuperfluous to endeavour to attaint him a ſecond time. But to this general rule however, as to all others, there are ſome exceptions; wherein, *ceſſante ratione, ceſſat et ipſa lex*. As, 1. Where the former attainder is reverſed for error, for then it [337] is the ſame as if it had never been. And the ſame reaſon

[l] 2 Hawk. P. C. 377. [m] *Ibid.* 375.

holds, where the attainder is reverſed by parliament, or the judgment vacated by the king's pardon, with regard to felonies committed afterwards. 2. Where the attainder was upon indictment, ſuch attainder is no bar to an appeal: for the prior ſentence is pardonable by the king; and if that might be pleaded in bar of the appeal, the king might in the end defeat the ſuit of the ſubject, by ſuffering the prior ſentence to ſtop the proſecution of a ſecond, and then, when the time of appealing is elapſed, granting the delinquent a pardon. 3. An attainder in felony is no bar to an indictment of treaſon: becauſe not only the judgment and manner of death are different, but the forfeiture is more extenſive, and the land goes to different perſons. 4. Where a perſon attainted of one felony, is afterwards indicted as principal in another, to which there are alſo acceſſories, proſecuted at the ſame time; in this caſe it is held, that the plea of *autrefois attaint* is no bar, but he ſhall be compelled to take his trial, for the ſake of public juſtice: becauſe the acceſſories to ſuch ſecond felony cannot be convicted till after the conviction of the principal [n]. And from theſe inſtances we may collect that the plea of *autrefois attaint* is never good, but when a ſecond trial would be quite ſuperfluous [o].

4. LASTLY, a *pardon* may be pleaded in bar; as at once deſtroying the end and purpoſe of the indictment, by remitting that puniſhment, which the proſecution is calculated to inflict. There is one advantage that attends pleading a pardon in bar, or in arreſt of judgment, *before* ſentence is paſt; which gives it by much the preference to pleading it *after* ſentence or attainder. This is, that by ſtopping the judgment it ſtops the attainder, and prevents the corruption of the blood: which, when once corrupted by attainder, cannot afterwards be reſtored, otherwiſe than by act of parliament. But, as the title of pardons is applicable to other ſtages of proſecution; and they have their reſpective force and efficacy, as well after as before conviction, outlawry, or attainder; I ſhall therefore reſerve the more minute conſi- [338]

[n] Poph. 107. [o] Staund. P. C. 107.

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deration of them, till I have gone through every other title except only that of execution.

BEFORE I conclude this head of special pleas in bar, it will be necessary once more to observe; that, though in civil actions when a man has his election what plea in bar to make, he is concluded by that plea, and cannot resort to another if that be determined against him; (as if, on an action of debt the defendant pleads a general release, and no such release can be proved, he cannot afterwards plead the general issue, *nil debet*, as he might at first: for he has made his election what plea to abide by, and it was his own folly to chuse a certain defence;) though, I say, this strictness is observed in civil actions, *quia interest reipublicæ ut sit finis litium*: yet in criminal prosecutions *in favorem vitæ*, as well upon appeal as indictment, when a prisoner's plea in bar is found against him upon issue tried by a jury, or adjudged against him in point of law by the court; still he shall not be concluded or convicted thereon, but shall have judgment of *respondeat ouster*, and may plead over to the felony the general issue, not guilty[p]. For the law allows many pleas, by which a prisoner may escape death; but only one plea, in consequence whereof it can be inflicted; *viz.* on the general issue, after an impartial examination and decision of the facts, by the unanimous verdict of a jury. It remains therefore that I consider,

V. THE general issue, or plea of *not guilty*[q], upon which plea alone the prisoner can receive his final judgment of death. In case of an indictment of felony or treason, there can be no special justification put in by way of plea. As, on an indictment for murder, a man cannot *plead* that it was in his own defence against a robber on the highway, or a burglar; but he must plead the general issue, not guilty, and give this special matter in evidence. For (besides that these pleas do in effect amount to the general issue; since, if true, the prisoner is most clearly not guilty) as the facts in treason are
[339] laid to be done *proditorie et contra ligeantiæ suæ debitum*, and,

[p] 2 Hal. P. C. 239. [q] See Append. § 1.

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in felony, that the killing was done *felonice*: these charges, of a traiterous or felonious intent, are the points and very *gist* of the indictment, and must be answered directly, by the general negative, not guilty; and the jury upon the evidence will take notice of any defensive matter, and give their verdict accordingly as effectually as if it were, or could be, specially pleaded. So that this is, upon all accounts, the most advantageous plea for the prisoner[s].

WHEN the prisoner hath thus pleaded not guilty, *non culpabilis*, or *nient culpable*; which was formerly used to be abbreviated upon the minutes, thus, "*non* (or *nient*) *cul.*" the clerk of the assise, or clerk of the arraigns, on behalf of the crown, replies, that the prisoner is guilty, and that he is ready to prove him so. This is done by two monosyllables in the same spirit of abbreviation, "*cul prit.*" which signifies first, that the prisoner is guilty, (*cul. culpable*, or *culpabilis*,) and then that the king is ready to prove him so; *prit*, *praesto sum*, or *paratus verificare*. This is therefore a replication on behalf of the king *viva voce* at the bar; which was formerly the course in all pleadings, as well in civil as in criminal causes. And that was done in the concisest manner: for when the pleader intended to demur, he expressed his demurrer in a single word, "*judgment*;" signifying that he demanded judgment whether the writ, declaration, plea, &c. either in form or matter, were sufficiently good in law: and if he meant to rest on the truth of the facts pleaded, he expressed that also in a single syllable, "*prit*;" signifying that he was ready to prove his assertions: as may be observed from the year-books and other antient repositories of law[t]. By this replication the king and the prisoner are therefore at issue: for we may remember, in our strictures upon pleadings in the preceding book[u], it was observed, that when the parties come to a fact, which is affirmed on one side and denied on the other, then they are said to be at issue in point of fact: which is evidently the case here, in the plea of *non* [340]

[s] 2 Hal. P. C. 258.
[t] North's life of lord Guildford. 98.
[u] See Vol. III. pag. 312.

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cul. by the priſoner; and the replication of *cul.* by the clerk. And we may alſo remember, that the uſual concluſion of all affirmative pleadings, as this of *cul.* or *guilty* is, was by an averment in theſe words, "and this he is *ready* to verify; *et hoc paratus eſt verificare*:" which ſame thing is here expreſſed by the ſingle word "*prit.*"

How our courts came to expreſs a matter of this importance in ſo odd and obſcure a manner, "*rem tantam tam negligenter*," can hardly be pronounced with certainty. It may perhaps, however, be accounted for by ſuppoſing, that theſe were at firſt ſhort notes, to help the memory of the clerk, and remind him what he was to reply; or elſe it was the ſhort method of taking down in court, upon the minutes, the replication and averment; "*cul. prit*:" which afterwards the ignorance of ſucceeding clerks adopted for the very words to be by them ſpoken [s].

But however it may have ariſen, the joining of iſſue, (which though now uſually entered on the record [w], is no otherwiſe joined [x] in any part of the proceedings,) ſeems to be clearly the meaning of this obſcure expreſſion [y]; which has puzzled our moſt ingenious etymologiſts, and is commonly underſtood as if the clerk of the arraigns, immediately on plea pleaded, had fixed an opprobrious name on the priſoner, by aſking him, "*culprit*, how wilt thou be tried!" for immediately upon iſſue joined it is inquired of the priſoner, by what trial he will make his innocence appear (1). This form

[s] Of this ignorance we may ſee daily inſtances, in the abuſe of two legal terms of antient French, one, the prologue to all proclamations, "*oyez*," or hear ye, which is generally pronounced moſt unmeaningly "O yes:" the other, a more pardonable miſtake, *viz.* when a jury are all ſworn, the officer bids the crier number them, for which the word in law-french is, "*counter*;" but we now hear it pronounced in very good Engliſh, "count them."

[w] See Appendix, § 2.

[x] 2 Hawk. P. C. 399.

[y] 2 Hal. P. C. 258.

(1) The learned judge's explanation of *prit* from *præſto ſum*, or *paratus verificare*, however ingenious, is certainly inconſiſtent both with the principles and practice of ſpecial pleading. After the general

has an preſent reference to appeals and appurtenants only wherein the appellee has his choice, either to try the accuſation by battel or by jury. But upon indictments, ſince the [341] abolition of ordeal, there can be no other trial but by jury, *per pais*, or by the country: and therefore, if the priſoner refuſes to put himſelf upon the inqueſt in the uſual form, that is, to anſwer that he will be tried by God and the country, if a commoner, and if a peer, by God and his peers[z],

[z] A learned author, who is very ſeldom miſtaken in his conjectures, has obſerved that the proper anſwer is, "*by God* "*or the country*," that is, either by *ordeal* or by *jury*; becauſe the queſtion ſuppoſes an option in the priſoner. And certainly it gives ſome countenance to this obſervation, that the trial by *ordeal* uſed formerly to be called *judicium Dei*. But it ſhould ſeem, that when the queſtion gives the priſoner an option, his anſwer muſt be poſitive; and not in the diſjunctive, which returns the option back to the proſecutor.

[a] Keylinge 57. State Trials, *paſſim*.

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neral iſſue, or the plea of not guilty, there could be no replication; or the words *paratus verificare* could not poſſibly have been uſed. This plea in Latin was entered thus upon the record: *Non vult eſſe culpabilis, et pro bono et malo ponit ſe ſuper patriam*; after this the attorney-general, the king's coroner, or clerk of aſſize could only join iſſue by *facit ſimiliter*, or *he doth the like*. (See App. p. 3. at the end of this book.) If then I might be allowed to indulge a conjecture of my own, I ſhould think that *prit* was an eaſy corruption of *pnt.* written for *ponit*, by the clerk, as a minute that iſſue was joined, or *ponit ſe ſuper patriam*; or *pnt ſe* might be converted into *priſt* or *preſt*, as it is ſometimes written. *Cul* was probably intended to denote the plea, and *prit* the iſſue; and theſe ſyllables being pronounced aloud by the clerk to give the court and priſoner an opportunity of hearing the accuracy of the minute, and being immediately followed by the queſtion, How wilt thou be tried? naturally induced the ignorant part of the audience to ſuppoſe that *cul prit* was an appellation given to the priſoner. As a confirmation of the conjecture that *prit* is a corruption for *pnt.*, the clerk of arraigns at this day, immediately after the arraignment, writes upon the indictment over the name of the priſoner, *puits*. And Roger North informs us, that in antient times, when pleadings in the courts were *ore tenus*, "if a ſerjeant in the common pleas ſaid "*judgment*, that was a demurrer; if *priſt*, that was an iſſue to "the country." *Life of Lord Keeper North*, 98.

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the indictment, if in treason, is taken *pro confesso*: and the prisoner, in cases of felony, is adjudged to stand mute, and, if he perseveres in his obstinacy, shall now [b] be convicted of the felony.

WHEN the prisoner has thus put himself upon his trial, the clerk answers in the humane language of the law, which always hopes that the party's innocence rather than his guilt may appear, "God send thee a good deliverance." And then they proceed, as soon as conveniently may be, to the trial; the manner of which will be considered at large in the next chapter.

[b] Stat. 12 Geo. III. c. 20.

CHAPTER THE TWENTY-SEVENTH.

OF TRIAL AND CONVICTION.

THE ſeveral methods of trial and conviction of offenders eſtabliſhed by the laws of England, were formerly more numerous than at preſent, through the ſuperſtition of our Saxon anceſtors: who, like other northern nations, were extremely addicted to divination: a character, which Tacitus obſerves of the antient Germans[a]. They therefore invented a conſiderable number of methods of purgation or trial, to preſerve innocence from the danger of falſe witneſſes, and in conſequence of a notion that God would always interpoſe miraculouſly, to vindicate the guiltleſs.

I. THE moſt antient[b] ſpecies of trial was that by *ordeal*; which was peculiarly diſtinguiſhed by the appellation of *judicium Dei*; and ſometimes *vulgaris purgatio*, to diſtinguiſh it from the canonical purgation, which was by the oath of the party. This was of two ſorts[c], either *fire*-ordeal, or *water*-ordeal; the former being confined to perſons of higher rank, the latter to the common people[d]. Both theſe might be performed by deputy: but the principal was to anſwer for the ſucceſs of the trial; the deputy only venturing ſome cor- [343]

[a] *de mor. Germ.* 10.

[b] *LL. Inæ*, c. 77.

[c] Mirr. c. 3. § 23.

[d] *Tenetur ſe purgare is qui accuſatur, per Dei judicium; ſcilicet per candum ferrum, vel per aquam, pro diverſitate conditionis hominum: per ferrum calidum ſi fuerit homo liber; per aquam, ſi fuerit ruſticus.* (Glanv. *l.* 14. *c.* 1.)

poral pain, for hire, or perhaps for friendſhip[e]. Fire-ordeal was performed either by taking up in the hand, unhurt, a piece of red-hot iron, of one, two, or three pounds weight; or elſe by walking, barefoot, and blindfold, over nine red-hot plowſhares, laid lengthwiſe at unequal diſtances: and if the party eſcaped being hurt, he was adjudged innocent; but if it happened otherwiſe, as without colluſion it uſually did, he was then condemned as guilty. However, by this latter method queen Emma, the mother of Edward the confeſſor, is mentioned to have cleared her character, when ſuſpected of familiarity with Alwyn biſhop of Wincheſter[f].

WATER-ordeal was performed, either by plunging the bare arm up to the elbow in boiling water, and eſcaping unhurt thereby: or by caſting the perſon ſuſpected into a river or pond of cold water; and, if he floated therein without any action of ſwimming, it was deemed an evidence of his guilt; but, if he ſunk, he was acquitted. It is eaſy to trace out the traditional relics of this water-ordeal, in the ignorant barbarity ſtill practiſed in many countries to diſcover witches, by caſting them into a pool of water, and drowning them to prove their innocence. And in the eaſtern empire the fire-ordeal was uſed to the ſame purpoſe by the emperor Theodore Laſcaris; who, attributing his ſickneſs to magic, cauſed all thoſe whom he ſuſpected to handle the hot iron: thus joining (as had been well remarked[g]) to the moſt dubious crime in the world, the moſt dubious proof of innocence.

AND indeed this purgation by ordeal ſeems to have been very antient, and very univerſal, in the times of ſuperſtitious barbarity. It was known to the antient Greeks: for in the
[344] Antigone of Sophocles[h], a perſon, ſuſpected by Creon of a miſdemeſnor, declares himſelf ready "to handle hot iron, "and to walk over fire," in order to manifeſt his innocence;

[e] This is ſtill expreſſed in that common form of ſpeech, "of going "through fire and water to ſerve an- "other."

[f] Tho. Rudborne *Hiſt. maj. Winton.* *l.* 4. *c.* 1.

[g] Sp. L. b. 12. c. 5.

[h] v. 270.

which,

which, the ſcholiaſt tells us, was then a very uſual purgation. And Grotius[i] gives us many inſtances of water-ordeal in Bithynia, Sardinia, and other places. There is alſo a very peculiar ſpecies of water-ordeal, ſaid to prevail among the Indians on the coaſt of Malabar; where a perſon accuſed of any enormous crime is obliged to ſwim over a large river abounding with crocodiles, and if he eſcapes unhurt, he is reputed innocent. As, in Siam, beſides the uſual methods of fire and water-ordeal, both parties are ſometimes expoſed to the fury of a tyger let looſe for that purpoſe: and, if the beaſt ſpares either, that perſon is accounted innocent; if neither, both are held to be guilty; but if he ſpares both, the trial is incomplete, and they proceed to a more certain criterion[k].

ONE cannot but be aſtoniſhed at the folly and impiety of pronouncing a man guilty, unleſs he was cleared by a miracle; and of expecting that all the powers of nature ſhould be ſuſpended, by an immediate interpoſition of providence to ſave the innocent, whenever it was preſumptuouſly required. And yet in England, ſo late as king John's time, we find grants to the biſhops and clergy to uſe the *judicium ferri, aquae, et ignis*[l]. And, both in England and Sweden, the clergy preſided at this trial, and it was only performed in the churches or in other conſecrated ground; for which Stiernhook[m] gives the reaſon; "*non deſuit illis operae et* "*laboris pretium; ſemper enim ab ejuſmodi judicio aliquid lucri* "*ſacerdotibus obveniebat.*" But, to give it it's due praiſe, we find the canon law very early declaring againſt trial by ordeal, or *vulgaris purgatio*, as being the fabric of the devil, "*cum ſit contra praeceptum Domini, non tentabis Dominum* "*Deum tuum*[n]." Upon this authority, though the canons themſelves were of no validity in England, it was thought [345] proper (as had been done in Denmark above a century before[o]) to diſuſe and aboliſh this trial entirely in our courts

[i] On Numb. v. 17.
[k] Mod. Univ. Hiſt. vii. 266.
[l] Spelm. *Gloſſ.* 435.
[m] *de jure Sueonum, l.* 1. *c.* 8.
[n] *Decret. part.* 2. *cauſ.* 2. *qu.* 5. *diſt.* 7. *Decretal. lib.* 3. *tit.* 50. *c.* 9. & *Gloſſ. ibid.*
[o] Mod. Un. Hiſt. xxxii. 105.

of juſtice, by an act of parliament in 3 Hen. III. according to ſir Edward Coke[p], or rather by an order of the king in council[q].

II. ANOTHER ſpecies of purgation, ſomewhat ſimilar to the former, but probably ſprung from a preſumptuous abuſe of revelation in the ages of dark ſuperſtition, was the *corſned* or morſel of execration: being a piece of cheeſe or bread, of about an ounce in weight, which was conſecrated with a form of exorciſm; deſiring of the Almighty that it might cauſe convulſions and paleneſs, and find no paſſage, if the man was really guilty; but might turn to health and nouriſhment, if he was innocent[r]: as the water of jealouſy among the Jews[s] was, by God's ſpecial appointment, to cauſe the belly to ſwell, and the thigh to rot, if the woman was guilty of adultery. This corſned was then given to the ſuſpected perſon, who at the ſame time alſo received the holy ſacrament[t]: if indeed the corſned was not, as ſome have ſuſpected, the ſacramental bread itſelf; till the ſubſequent invention of tranſubſtantiation preſerved it from profane uſes with a more profound reſpect than formerly. Our hiſtorians aſſure us, that Godwin, earl of Kent, in the reign of king Edward the confeſſor, abjuring the death of the king's brother, at laſt appealed to his corſned, "*per buccellam deglutiendam abjuravit*[u]," which ſtuck in his throat and killed him. This cuſtom has been long ſince gradually aboliſhed, though the remembrance of it ſtill ſubſiſts in certain phraſes of abjuration retained among the common people[w].

[346] HOWEVER we cannot but remark, that though in European countries this cuſtom moſt probably aroſe from an abuſe of revealed religion, yet credulity and ſuperſtition will, in

[p] 9 Rep. 32.
[q] 1 Rym. *Fœd.* 228. Spelm. *Gloſſ.* 326. 2 Pryn. Rec. Append. 20. Seld. *Eadm. fol.* 48.
[r] Spelm. *Gl.* 439.
[s] Numb. ch. 5.
[t] *LL. Canut.* c. 6.
[u] Ingulph.
[w] As, "I will take the ſacrament "upon it; may this morſel be my laſt;" and the like.

all ages and in all climates, produce the ſame or ſimilar effects. And therefore we ſhall not be ſurprized to find, that in the kingdom of Pegu there ſtill ſubſiſts a trial by the corſned, very ſimilar to that of our anceſtors, only ſubſtituting raw rice inſtead of bread[x]. And, in the kingdom of Monomotapa, they have a method of deciding lawſuits equally whimſical and uncertain. The witneſs for the plaintiff chews the bark of a tree, endued with an emetic quality; which, being ſufficiently maſticated, is then infuſed in water, which is given the defendant to drink. If his ſtomach rejects it, he is condemned: if it ſtays with him he is abſolved, unleſs the plaintiff will drink ſome of the ſame water; and, if it ſtays with him alſo, the ſuit is left undetermined[y].

THESE two antiquated methods of trial were principally in uſe among our Saxon anceſtors. The next, which ſtill remains in force, though very rarely in uſe, owes it's introduction among us to the princes of the Norman line. And that is

III. THE trial by *battel*, duel, or ſingle combat; which was another ſpecies of preſumptuous appeals to providence, under an expectation that heaven would unqueſtionably give the victory to the innocent or injured party. The nature of this trial in caſes of civil injury, upon iſſue joined in a writ of right, was fully diſcuſſed in the preceding book[z]: to which I have only to add, that the trial by battel may be demanded at the election of the appellee, in either an appeal or an approvement; and that it is carried on with equal ſolemnity as that on a writ of right: but with this difference, that there each party might hire a champion, but here they muſt fight in their proper perſons. And therefore if the appellant or approver be a woman, a prieſt, an infant, or of the age [347] of ſixty, or lame, or blind, he or ſhe may counterplead and refuſe the wager of battel; and compel the appellee to put

[x] Mod. Univ. Hiſt. vii. 129.
[y] *Ibid.* xv. 464.
[z] See Vol. III. pag. 337.

himſelf upon the country. Alſo peers of the realm, bringing an appeal, ſhall not be challenged to wage battel, on account of the dignity of their perſons; nor the citizens of London, by ſpecial charter, becauſe fighting ſeems foreign to their education and employment. So likewiſe if the crime be notorious; as if the thief be taken with the *mainour*, or the murderer in the room with a bloody knife, the appellant may refuſe the tender of battel from the appellee[a]; for it is unreaſonable that an innocent man ſhould ſtake his life againſt one who is already half-convicted.

THE form and manner of waging battel upon appeals are much the ſame as upon a writ of right; only the oaths of the two combatants are vaſtly more ſtriking and ſolemn[b]. The appellee, when appealed of felony, pleads *not guilty*, and throws down his glove, and declares he will defend the ſame by his body: the appellant takes up the glove, and replies that he is ready to make good the appeal, body for body. And thereupon the appellee, taking the book in his right hand, and in his left the right hand of his antagoniſt, ſwears to this effect. "*Hoc audi, homo, quem per manum* "*teneo, &c.* Hear this, O man, whom I hold by the "hand, who calleſt thyſelf John by the name of baptiſm, "that I, who call myſelf Thomas by the name of baptiſm, "did not felonioufly murder thy father, William by name, "nor am any way guilty of the ſaid felony. So help me "God, and the ſaints; and this I will defend againſt thee "by my body, as this court ſhall award." To which the appellant replies, holding the bible and his antagoniſt's hand in the ſame manner as the other: "Hear this, O man, whom "I hold by the hand, who calleſt thyſelf Thomas by the "name of baptiſm, that thou art perjured; and therefore "perjured, becauſe that thou felonioufly didſt murder my
[348] "father, William by name. So help me God and the ſaints; "and this I will prove againſt thee by my body, as this

[a] 2 Hawk. P. C. 427. [b] Flet. l. 1. c. 34. 2 Hawk. P. C. 426.

"court

"court ſhall award[c]." The battel is then to be fought with the ſame weapons, *viz.* batons, the ſame ſolemnity, and the ſame oath againſt amulets and ſorcery, that are uſed in the civil combat: and if the appellee be ſo far vanquiſhed, that he cannot or will not fight any longer, he ſhall be adjudged to be hanged immediately; and then, as well as if he be killed in battel, providence is deemed to have determined in favour of the truth, and his blood ſhall be attainted. But if he kills the appellant, or can maintain the fight from ſunriſing till the ſtars appear in the evening, he ſhall be acquitted. So alſo if the appellant becomes recreant, and pronounces the horrible word of *craven*, he ſhall loſe his *liberam legem*, and become infamous; and the appellee ſhall recover his damages, and alſo be for ever quit, not only of the appeal, but of all indictments likewiſe for the ſame offence (1).

IV. THE fourth method of trial uſed in criminal caſes is that by the peers of Great Britain, in the court of parliament, or the court of the lord high ſteward, when a peer is capitally *indicted*: for in caſe of an *appeal*, a peer ſhall be

[c] There is a ſtriking reſemblance between this proceſs and that of the court of *Areopagus* at Athens, for murder; wherein the proſecutor and priſoner were both ſworn in the moſt ſolemn manner: the proſecutor, that he was related to the deceaſed, (for none but near relations were permitted to proſecute in that court,) and that the priſoner was the cauſe of his death; the priſoner, that he was innocent of the charge againſt him. (Pott. Antiq. b. 1. c. 19.)

(1) The laſt time that the trial by battel was awarded in this country, was in the caſe of lord Rea and Mr. Ramſey, in the 7 Ch. I. The king by his commiſſion appointed a conſtable of England to preſide at the trial, who appointed a day for the duel, on which the combatants were to appear with a ſpear, a long ſword, a ſhort ſword, and a dagger; but the combat was prorogued to a further day, before which the king revoked the commiſſion. See an account of the proceedings, 11 *Harg. St. Tr.* 124.

tried by jury[f] (a). Of this enough has been said in a former chapter[g] to which I shall only now add, that in the method and regulation of it's proceedings, it differs little from the trial *per patriam*, or by jury: except that no special verdict can be given in the trial of a peer[h]; because the lords of parliament, or the lord high steward (if the trial be had in his court) are judges sufficiently competent of the law
[349] that may arise from the fact: and except also that the peers need not all agree in their verdict; but the greater number, consisting of twelve at the least, will conclude, and bind the minority[i].

V. THE trial by jury, or the country, *per patriam*, is also that trial by the peers of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter[k]: "*nullus liber homo capiatur, vel imprisonetur, aut* "*exulet, aut aliquo alio modo destruatur, nisi per legale judicium* "*parium suorum, vel per legem terrae.*"

THE antiquity and excellence of this trial, for the settling of civil property, has before been explained at large[l]. And it will hold much stronger in criminal cases; since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has therefore wisely placed this strong and twofold barrier, of a presentment and a trial by jury, between the liberties of the people, and

[f] 9 Rep. 30. 2 Inst. 49.
[g] See pag. 259.
[h] Hatt. 116.
[i] Kelynge, 56. stat. 7 W. III. c. 3. § 11. Foster. 247.
[k] 9 Hen. III. c. 29.
[l] See Vol. III, pag. 379.

(a) The nobility are tried by their peers for treason and felony, and misprision of these; but in all other criminal prosecutions they are tried like commoners by a jury. 3 *Inst.* 30. See 1 vol. 401.

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the prerogative of the crown. It was neceſſary, for preſerving the admirable balance of our conſtitution, to veſt the executive power of the laws in the prince: and yet this power might be dangerous and deſtructive to that very conſtitution, if exerted without check or control, by juſtices of *oyer* and *terminer* occaſionally named by the crown; who might then, as in France or Turkey, impriſon, diſpatch, or exile any man that was obnoxious to the government, by an inſtant declaration, that ſuch is their will and pleaſure. But the founders of the Engliſh law have with excellent forecaſt contrived, that no man ſhould be called to anſwer to the king for any capital crime, unleſs upon the preparatory accuſation of twelve or more of his fellow-ſubjects, the grand jury: and that the truth of every accuſation, whether preferred in the ſhape of indictment, information, or appeal, [350] ſhould afterwards be confirmed by the unanimous ſuffrage of twelve of his equals and neighbours, indifferently choſen, and ſuperior to all ſuſpicion. So that the liberties of England cannot but ſubſiſt, ſo long as this *palladium* remains ſacred and inviolate; not only from all open attacks, (which none will be ſo hardy as to make,) but alſo from all ſecret machinations, which may ſap and undermine it; by introducing new and arbitrary methods of trial, by juſtices of the peace, commiſſioners of the revenue, and courts of conſcience. And however *convenient* theſe may appear at firſt, (as doubtleſs all arbitrary powers, well executed, are the moſt *convenient*,) yet let it be again remembered, that delays, and little inconveniences in the forms of juſtice, are the price that all free nations muſt pay for their liberty in more ſubſtantial matters; that theſe inroads upon this ſacred bulwark of the nation are fundamentally oppoſite to the ſpirit of our conſtitution; and that, though begun in trifles, the precedent may gradually increaſe and ſpread, to the utter diſuſe of juries in queſtions of the moſt momentous concern.

WHAT was ſaid of juries in general, and the trial thereby, in *civil* caſes, will greatly ſhorten our preſent remarks, with regard to the trial of *criminal* ſuits; indictments, informations,

tions, and appeals; which trial I shall consider in the same method that I did the former; by following the order and course of the proceedings themselves, as the most clear and perspicuous way of treating it.

WHEN therefore a prisoner on his arraignment has pleaded *not guilty*, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto*; that is freeholders (3), without just exception, and of the *visne* or neighbourhood: which is interpreted to be of the county where the fact is committed[1]. If the proceedings are before the court of king's bench, there is time allowed, between the arraignment and the trial, for a jury to be impa-
[351] nelled by writ of *venire facias* to the sheriff, as in civil causes: and the trial in case of a misdemesnor is had at *nisi prius*, unless it be of such consequence as to merit a trial at bar; which is always invariably had when the prisoner is tried for any capital offence (4). But, before commissioners of *oyer* and *terminer* and gaol delivery, the sheriff, by virtue of a general precept directed to him beforehand, returns to the court a panel of forty-eight jurors, to try all felons that may be called upon their trial at that session: and therefore it is there usual to try all felons immediately, or soon, after their arraignment. But it is not customary, nor agreeable to the general course of proceedings, (unless by consent of parties, or where the defendant is actually in gaol,) to try persons indicted of smaller misdemesnors at the same court in which they have pleaded *not guilty*, or traversed the indictment. But they usually give security to the court, to appear at the next

[1] 2 Hal. P. C. 264. 2 Hawk. P. C. 403.

(3) Since the 4 & 5 *W. & M. c.* 24. which admits copyholders upon juries, it is not necessary that the jurors should be freeholders in criminal cases, except in treason, and there it is expressly required by the bill of rights. 1 *W. & M. st.* 2. *c.* 2.

(4) See how indictments for capital offences may be tried at *nisi prius*, p. 309. n. 3. *ante*.

assises

aſſiſes or ſeſſion, and then and there to try the traverſe, giving notice to the proſecutor of the ſame (5).

In caſes of high treaſon, whereby corruption of blood may enſue, (except treaſon in counterfeiting the king's coin or ſeals,) or miſpriſion of ſuch treaſon, it is enacted by ſtatute 7 W. III. c. 3. firſt, that no perſon ſhall be tried for any ſuch treaſon, except an attempt to aſſaſſinate the king, unleſs the indictment be found within three years after the offence committed: next, that the priſoner ſhall have a copy of the indictment, (which includes the caption[k],) but not the names of the witneſſes, five days at leaſt before the trial; that is, upon the true conſtruction of the act, before his arraignment[l]; for then is his time to take any exceptions thereto, by way of plea or demurrer: thirdly, that he ſhall alſo have a copy of the panel or jurors two days before his trial: and, laſtly, that he ſhall have the ſame compulſive proceſs to bring in his witneſſes *for* him, as was uſual to compel their appearance *againſt* him. And, by ſtatute 7 Ann. c. 21. (which did not take place till after the deceaſe of the late pretender), all perſons, indicted for high treaſon or miſpriſion thereof, ſhall have not only a copy of the indictment, but a [352] liſt of all the witneſſes to be produced, and of the jurors impanelled, with their profeſſions and places of abode, delivered to him ten days before the trial, and in the preſence of two witneſſes; the better to prepare him to make his challenges and defence. But this laſt act, ſo far as it affected indictments for the inferior ſpecies of high treaſon, reſpecting the coin and the royal ſeals, is repealed by the ſtatute 6 Geo. III. c. 53. elſe it had been impoſſible to have tried thoſe of-

[k] Foſt. 229. Ap. end. i. [l] *Ibid.* 230.

(5) Every defendant indicted for a miſdemeſnor ſhould give full eight days notice of trial to the proſecutor, before the aſſizes, if the trial is to be there; if at the ſeſſions, it is uſual to give two or three days notice. *Cr. Circ. Comp.* 17. 48. Or the juſtices at ſeſſions fix as a general rule what time they think a reaſonable notice in ſuch caſes.

fences in the ſame circuit in which they are indicted: for ten clear days, between the finding and the trial of the indictment, will exceed the time uſually allotted for any ſeſſion of *oyer* and *terminer*[m] (6). And no perſon indicted for felony is, or (as the law ſtands) ever can be, entitled to ſuch copies, before the time of his trial[n].

When the trial is called on, the jurors are to be ſworn, as they appear, to the number of twelve, unleſs they are challenged by the party.

Challenges may here be made, either on the part of the king, or on that of the priſoner; and either to the whole array, or to the ſeparate polls, for the very ſame reaſons that they may be made in civil cauſes[o]. For it is here at leaſt as neceſſary, as there, that the ſheriff or returning officer be totally indifferent; that where an alien is indicted, the jury ſhould be *de medietate*, or half foreigners, if ſo many are found in the place; (which does not indeed hold in treaſons, aliens being very improper judges of the breach of allegiance; nor yet in the caſe of Egyptians under the ſtatute 22 Hen. VIII. c. 10.) that on every panel there ſhould be a competent number of hundredors; and that the particular jurors ſhould be *omni exceptione majores*; not liable to objection either *propter honoris reſpectum*, *propter defectum*, *propter affectum*, or *propter delictum*.

[353] Challenges upon any of the foregoing accounts are ſtiled challenges *for cauſe*; which may be without ſtint in both criminal and civil trials. But in criminal caſes, or at leaſt in capital ones, there is, *in favorem vitæ*, allowed to

[m] Poſt. 250.
[n] 2 Hawk. P. C. 410.
[o] See Vol. III. p. 359.
[p] 2 Hawk. P. C. 420. 2 Hal. P. C. 271.

(6) It is the practice to deliver the copy of the indictment, and the liſts of witneſſes and jurors, ten clear days, excluſive of the day of delivery and the day of trial, and of intervening Sundays previous to the trial. *Poſt.* 2. 250.

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the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without shewing any cause at all; which is called a *peremptory* challenge: a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous (7). This is grounded on two reasons. 1. As every one must be sensible, what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another; and how necessary it is, that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shewn, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases, peremptorily to set him aside.

This privilege, of peremptory challenges, though granted to the prisoner, is denied to the king by the statute 33 Edw. I. st. 4. which enacts, that the king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court. However it is held, that the king need not assign his cause of challenge, till all the panel is gone through, and unless there cannot be a full jury without the persons so challenged. And then, and not sooner, the king's counsel must shew the cause: otherwise the juror shall be sworn [q] (8).

The peremptory challenges of the prisoner must however have some reasonable boundary; otherwise he might never

[q] 2 Hawk. P. C. 413. 2 Hal. P. C. 271.

(7) A peremptory challenge is not allowed in the trial of collateral issues. *Foſt.* 42. Nor in any trial for a misdemesnor. 2 *Harg. St. Tr.* 808. and 4 *H. St. Tr.* 1.

(8) And the practice is the same both in trials for misdemesnors and for capital offences. 3 *Harg. St. Tr.* 519.

be

be tried. This reasonable boundary is settled by the common law to be the number of thirty-five; that is, one under the number of three full juries. For the law judges that five and thirty are fully sufficient to allow the most timorous man to challenge through mere caprice; and that he who peremptorily challenges a great number, or three full juries, has no intention to be tried at all. And therefore it dealt with one, who peremptorily challenges above thirty-five, and will not retract his challenge, as with one who stands mute or refuses his trial; by sentencing him to the *peine forte et dure* in felony, and by attainting him in treason[r]. And so the law stands at this day with regard to treason of any kind.

But by statute of 22 Hen. VIII. c. 14. (which, with regard to felonies, stands unrepealed by statute 1 & 2 Ph. & Mar. c. 10.) by this statute, I say, no person arraigned for felony can be admitted to make any more than *twenty* peremptory challenges. But how if the prisoner will peremptorily challenge twenty-one, what shall be done? The old opinion was, that judgment of *peine forte et dure* should be given, as where he challenged thirty-six at the common law[s]: but the better opinion seems to be[t], that such challenge shall only be disregarded and over-ruled. Because, first, the common law doth not inflict the judgment of penance for challenging twenty-one, neither doth the statute inflict it; and so heavy a judgment (or that of conviction, which succeeds it) shall not be imposed by implication. Secondly, the words of the statute are, "that he be not *admitted* to challenge more "than twenty;" the evident construction of which is, that any farther challenge shall be disallowed or prevented: and therefore, being null from the beginning, and never in fact a challenge, it can subject the prisoner to no punishment; but the juror shall be regularly sworn.

If, by reason of challenges or the default of the jurors, a sufficient number cannot be had of the original panel, a *tales*

[r] 2 Hal. P. C. 268.
[s] 2 Hawk. P. C. 414.
[t] 3 Inst. 217. 2 Hal. P. C. 270.

may

may be awarded as in civil cauſes [u], till the number of twelve is ſworn, "well and truly to try, and true deliverance make, "between our ſovereign lord the king, and the priſoner "whom they have in charge; and a true verdict to give, "according to their evidence."

WHEN the jury is ſworn, if it be a cauſe of any conſequence, the indictment is uſually opened, and the evidence marſhalled, examined, and enforced by the counſel for the crown, or proſecution. But it is a ſettled rule at common law, that no counſel ſhall be allowed a priſoner upon his trial, upon the general iſſue, in any capital crime, unleſs ſome point of law ſhall ariſe proper to be debated [w]. A rule, which (however it may be palliated under cover of that noble declaration of the law, when rightly underſtood, that the judge ſhall be counſel for the priſoner; that is, ſhall ſee that the proceedings againſt him are legal and ſtrictly regular [x]) ſeems to be not at all of a piece with the reſt of the humane treatment of priſoners by the Engliſh law. For upon what face of reaſon can that aſſiſtance be denied to ſave the life of a man, which yet is allowed him in proſecutions for every petty treſpaſs? Nor indeed is it ſtrictly ſpeaking a part of our antient law: for the mirrour [y], having obſerved the neceſſity of counſel in civil ſuits, "who know how to forward and defend "the cauſe, by the rules of law and cuſtoms of the realm," immediately afterwards ſubjoins; "and more neceſſary are "they for defence upon indictments and appeals of felony, "than upon other venial cauſes [z]." And the judges them-

[u] See Vol. III. pag. 364. But, in mere commiſſions of gaol delivery, no *tales* can be awarded; though the court may *ore tenus* order a new panel to be returned *inſtanter*. (4 Inſt. 68. 4 St. Tr. 728. Cooke's Caſe.)

[w] 2 Hawk P. C. 400.

[x] Sir Edward Coke (3 Inſt 137.) gives another additional reaſon for this refuſal, "becauſe the evidence to con-"vict a priſoner ſhould be ſo manifeſt, as "it could not be contradicted." Which lord Nottingham (when high ſteward) declared (3 St. Tr. 726.) was the only good reaſon that could be given for it.

[y] c. 3. § 1.

[z] Father Parſons the jeſuit, and after him biſhop Ellys (of Engliſh liberty, ii. 26.), have imagined, that the benefit of counſel to plead for them was firſt denied to priſoners by a law of Hen. I. meaning (I preſume) chapter 47 and 48 of the code which is uſually attributed to that prince. "*De cauſis criminalib.* "*vel capitalibus nemo quærat conſilium; "quin implacitatus ſtatim peroret, ſine*

"*amni*

ſelves are ſo ſenſible of this defect, that they never ſcruple to allow a priſoner counſel to inſtruct him what queſtions to
[356] aſk, or even to aſk queſtions for him, with reſpect to matters of fact: for as to matters of law, ariſing on the trial, they are *entitled* to the aſſiſtance of counſel. But, leſt this indulgence ſhould be intercepted by ſuperior influence, in the caſe of ſtate-criminals, the legiſlature has directed by ſtatute 7 W. III. c. 3. that perſons *indicted* for ſuch high treaſon, as works a corruption of the blood, or miſpriſion thereof, (except treaſon in counterfeiting the king's coin or ſeals,) may make their full defence by counſel, not exceeding two, to be named by the priſoner and aſſigned by the court or judge: and the ſame indulgence, by ſtatute 20 Geo. II. c. 30. is extended to parliamentary *impeachments* for high treaſon, which were excepted in the former act (9).

" *autoi petitione conſilii.—In aliis omnibus* " *poteſt et debet uti conſilio.*"—But this *conſilium*, I conceive, ſignifies only an *imparlance*, and the *petitio conſilii* is *craving leave to imparl*; (See Vol. III. pag. 298.) which is not allowable in any criminal proſecution. This will be manifeſt by comparing this law with a contemporary paſſage in the *grand couſtumier* of Normandy, (ch. 85.) which ſpeaks of imparlances in perſonal actions. " *Apres ce, eſt tenu le querelle a* " *reſpondre; et aura congie de ſoy con-* " *ſeiller, s'il le demande: et quand il* " *ſera conſeille il peut nyer le faict dont* " *il eſt accuſe.*" Or, as it ſtands in the Latin text, (*edit.* 1539.) " *Querelatus* " *autem poſtea tenetur reſpondere; et ha-* " *bebit licentiam conſulendi, ſi requirat;* " *habito autem conſilio, debet factum ne-* " *gare quo accuſatus eſt.*"

(9) Upon the trial of iſſues which do not turn upon the queſtion of guilty or not guilty, but upon collateral facts, priſoners under a capital charge, whether for treaſon or felony, always were entitled to the full aſſiſtance of counſel. *Foſt.* 232. 42. It is very extraordinary that the law of England ſhould have denied the aſſiſtance of counſel, when it is wanted moſt, *viz.* to defend the life, the honour, and all the property of an individual. It is the extenſion of that maxim of natural equity, that every one ſhall be heard in his own cauſe, that warrants the admiſſion of hired advocates in courts of juſtice; for there is much greater inequality in the powers of explanation and perſuaſion in the natural ſtate of the human mind, than when it is improved by education and experience. Amongſt profeſſional men of eſtabliſhed character, the difference in their ſkill and management is generally ſo inconſiderable, that the deciſion of the cauſe depends only upon the ſuperiority

THE doctrine of evidence upon pleas of the crown is, in moſt reſpects, the ſame as that upon civil actions. There are however a few leading points, wherein, by ſeveral ſtatutes,

periority of the juſtice in the reſpective caſes of the litigating parties. Hence the practice of an advocate is abſolutely neceſſary to the adminiſtration of ſubſtantial juſtice. An honourable barriſter will never miſ-ſtate either law or facts within his own knowledge, but he is juſtified in urging any argument, whatever may be his own opinion of the ſolidity or juſtneſs of it, which he may think will promote the intereſts of his client; for reaſoning in courts of juſtice and in the ordinary affairs of life ſeldom admits of geometrical demonſtration; but it happens not unfrequently that the ſame argument, which appears ſophiſtry to one, is ſound logic in the mind of another, and every day's experience proves that the opinions of a judge and an advocate are often diametrically oppoſite. Many circumſtances may occur, which will juſtify or compel an individual member of the profeſſion to refuſe the defence of a particular client, but a cauſe can hardly be conceived which ought to be rejected by all the bar; for ſuch a conduct in the profeſſion would excite ſo ſtrong a prejudice againſt the party, as to render him in a great degree condemned before his trial. Let the circumſtances againſt a priſoner be ever ſo atrocious, it is ſtill the duty of the advocate to ſee that his client is convicted according to thoſe rules and forms, which the wiſdom of the legiſlature has eſtabliſhed as the beſt protection of the liberty and the ſecurity of the ſubject. But the conduct of counſel in the proſecution of criminals, ought to be very different from that which is required from them in civil actions, or when they are engaged on the ſide of a priſoner; in the latter caſes they are the advocates of their client only, and ſpeak but by his inſtruction and permiſſion; in the former they are the advocates of public juſtice, or to ſpeak more profeſſionally, they are the advocates of the king, who, in all criminal proſecutions, is the repreſentative of the people, and both the king and the country muſt be better ſatisfied with the acquittal of the innocent, than with the conviction of the guilty. Hence in all criminal proſecutions, eſpecially where the priſoner can have no counſel to plead for him, a barriſter is as much bound to diſcloſe all thoſe circumſtances to the jury, and to reaſon upon them as fully, which are favourable to the priſoner, as thoſe, which are likely to ſupport the proſecution.

and reſolutions, a difference is made between civil and criminal evidence.

FIRST, in all caſes of high treaſon, petit treaſon, and miſpriſion of treaſon, by ſtatutes 1 Edw. VI. c. 12. and 5 & 6 Edw. VI. c. 11. *two* lawful witneſſes are required to convict a priſoner; unleſs he ſhall willingly and without violence *confeſs* the ſame. By ſtatute 1 & 2 Ph. & Mar. c. 10. a farther exception is made as to treaſons in counterfeiting the king's ſeals or ſignatures, and treaſons concerning coin current within this realm; and more particularly by c. 11. the offences of importing counterfeit foreign money current in this kingdom, and impairing, counterfeiting, or forging any current coin. The ſtatutes 8 & 9 W. III. c. 25. and 15
[357] & 16 Geo. II. c. 28. in their ſubſequent extenſions of this ſpecies of treaſon do alſo provide, that the offenders may be indicted, arraigned, tried, convicted, and attainted, by the like evidence, and in ſuch manner and form, as may be had and uſed againſt offenders for counterfeiting the king's money. But by ſtatute 7 W. III. c. 3. in proſecutions for thoſe treaſons to which that act extends, the ſame rule (of requiring *two* witneſſes) is again enforced; with this addition, that the *confeſſion* of the priſoner, which ſhall countervail the neceſſity of ſuch proof, muſt be in *open court*. In the conſtruction of which act it hath been holden [a], that a confeſſion of the priſoner, taken out of court, before a magiſtrate or perſon having competent authority to take it, and proved by two witneſſes, is ſufficient to convict him of treaſon. But haſty unguarded confeſſions, made to perſons having no ſuch authority, ought not to be admitted as evidence under this ſtatute. And indeed, even in caſes of felony at the common law, they are the weakeſt and moſt ſuſpicious of all teſtimony; ever liable to be obtained by artifice, falſe hopes, promiſes of favour, or menaces; ſeldom remembered accurately, or reported with due preciſion; and incapable in their nature of being diſproved by other negative evidence. By

[a] Foſter. 240—244.

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the ſame ſtatute 7 W. III. it is declared that both witneſſes muſt be to the ſame overt act of treaſon, or one to one overt act, and the other to another overt act, of the ſame ſpecies of treaſon[b], and not of diſtinct heads or kinds: and no evidence ſhall be admitted to prove any overt act not expreſsly laid in the indictment. And therefore in ſir John Fenwick's caſe, in king William's time, where there was but one witneſs, an act of parliament[c] was made on purpoſe to attaint him of treaſon, and he was executed[d]. But in almoſt every other accuſation one poſitive witneſs is ſufficient. Baron Monteſquieu lays it down for a rule[e], that thoſe laws which condemn a man to death *in any caſe* on the depoſition of a ſingle witneſs, are fatal to liberty: and he adds this reaſon, that the witneſs who affirms, and the accuſed who denies, make an equal balance[f]; there is a neceſſity therefore to call in a third man to incline the ſcale. But this ſeems to be [358] carrying matters too far: for there are ſome crimes, in which the very privacy of their nature excludes the poſſibility of having more than one witneſs; muſt theſe therefore eſcape unpuniſhed? Neither indeed is the bare denial of the perſon accuſed equivalent to the poſitive oath of a diſintereſted witneſs. In caſes of indictments for perjury, this doctrine is better founded; and there our law adopts it: for one witneſs is not allowed to convict a man indicted for perjury; becauſe then there is only one oath againſt another[g]. In caſes of treaſon alſo there is the accuſed's oath of allegiance, to counterpoiſe the information of a ſingle witneſs; and that may perhaps be one reaſon why the law requires a double teſtimony to convict him: though the principal reaſon, undoubtedly, is to ſecure the ſubject from being ſacrificed to fictitious conſpiracies, which have been the engines of profligate and crafty politicians in all ages.

SECONDLY, though from the reverſal of colonel Sidney's attainder by act of parliament in 1689[h] it may be collected[i],

[b] See St. Tr. II. 144. Foſter. 235.
[c] Stat. 8 W. III. c. 4.
[d] Stat. Tr. V. 40.
[e] Sp. L. b. 12. c. 3.
[f] Beccar. c. 13.
[g] 10 Mod. 194.
[h] St. Tr. VIII. 472.
[i] 2 Hawk. P. C. 431.

that the mere ſimilitude of hand-writing in two papers ſhewn to a jury, without other concurrent teſtimony, is no evidence that both were written by the ſame perſon; yet undoubtedly the teſtimony of witneſſes, well acquainted with the party's hand, that they believe the paper in queſtion to have been written by him, is evidence to be left to a jury j (10).

THIRDLY, by the ſtatute 21 Jac. I. c. 27. a mother of a baſtard child, concealing it's death, muſt prove by one witneſs that the child was born dead; otherwiſe ſuch concealment ſhall be evidence of her having murdered it [k].

FOURTHLY, all preſumptive evidence of felony ſhould be admitted cautiouſly: for the law holds, that it is better that ten guilty perſons eſcape, than that one innocent ſuffer. [359] And ſir Matthew Hale in particular [l] lays down two rules moſt prudent and neceſſary to be obſerved: 1. Never to convict a man for ſtealing the goods of a perſon unknown, merely becauſe he will give no account how he came by them, unleſs an actual felony be proved of ſuch goods: and, 2. Never to convict any perſon of murder or manſlaughter, till at leaſt the body be found dead; on account of two inſtances he mentions, where perſons were executed for the murder of others, who were then alive, but miſſing.

LASTLY, it was an antient and commonly received practice [m], (derived from the civil law, and which alſo to this day obtains in the kingdom of France [n],) that, as counſel was not allowed to any priſoner accuſed of a capital crime, ſo

j Lord Preſton's caſe. *A. D.* 1690. St. Tr. IV. 453. Francia's caſe, *A. D.* 1716. St. Tr. VI. 69. Layer's caſe, *A. D.* 1722. *Ibid.* 279. Henzey's caſe, *A. D.* 1758. 4 Burr. 644.

k See pag. 198.

l 2 Hal. P. C. 290.

m St. Tr. I. *paſſim.*

n Domat. publ. law. b. 3. t. 1. Monteſq. Sp. L. b. 29. c. 11.

(10) But the proof of hand-writing is not evidence in high treaſon, unleſs the papers are found in the cuſtody of the priſoner. 1 *Burr.* 644.

neither

neither ſhould he be ſuffered to exculpate himſelf by the teſtimony of any witneſſes. And therefore it deſerves to be remembered, to the honour of Mary I. (whoſe early ſentiments, till her marriage with Philip of Spain, ſeem to have been humane and generous [o],) that when ſhe appointed ſir Richard Morgan chief juſtice of the common pleas, ſhe injoined him, "that notwithſtanding the old error, which "did not admit any witneſs to ſpeak, or any other matter "to be heard, in favour of the adverſary, her majeſty being "party; her highneſs's pleaſure was, that whatſoever could "be brought in favour of the ſubject ſhould be admitted to "be heard: and moreover, that the juſtices ſhould not per-"ſuade themſelves to ſit in judgment otherwiſe for her high-"neſs than for her ſubject [p]." Afterwards, in one particular inſtance (when embezzling the queen's military ſtores was made felony by ſtatute 31 Eliz. c. 4.) it was provided that any perſon impeached for ſuch felony, "ſhould be received "and admitted to make any lawful proof that he could, by "lawful witneſs or otherwiſe, for his diſcharge and defence:" and in general the courts grew ſo heartily aſhamed of a doctrine ſo unreaſonable and oppreſſive, that a practice was gradually introduced of examining witneſſes for the priſoner, but not upon oath [q]: the conſequence of which ſtill was, that [360] the jury gave leſs credit to the priſoner's evidence, than to that produced by the crown. Sir Edward Coke [r] proteſts very ſtrongly againſt this tyrannical practice: declaring that he never read in any act of parliament, book-caſe, or record, that in criminal caſes the party accuſed ſhould not have witneſſes ſworn for him; and therefore there was not ſo much as *ſcintilla juris* againſt it [s]. And the houſe of commons were ſo ſenſible of this abſurdity, that, in the bill for aboliſhing hoſtilities between England and Scotland [t], when felonies committed by Engliſhmen in Scotland were ordered to be tried in one of the three northern counties, they inſiſted on

[o] See pag. 17.
[p] Hollingſh. 1112. St. Tr. 1. 72.
[q] 3 Bulſt. 147. Cro. Car. 293.
[r] 3 Inſt. 79.
[s] See alſo 2 Hal. P. C. 283. and his ſummary, 264.
[t] Stat. 4 Jac. I. c. 1.

a clauſe, and carried it[t] againſt the efforts of both the crown and the houſe of lords, againſt the practice of the courts in England, and the expreſs law of Scotland[u], "that in all "ſuch trials for the better diſcovery of the truth, and the "better information of the conſciences of the jury and juſ-"tices, there ſhall be allowed to the party arraigned the be-"nefit of ſuch credible witneſſes, to be examined upon oath "as can be produced for his clearing and juſtification." At length by the ſtatute 7 W. III. c. 3. the ſame meaſure of juſtice was eſtabliſhed throughout all the realm, in caſes of treaſon within the act: and it was afterwards declared by ſtatute 1 Ann. ſt. 2. c. 9. that in all caſes of treaſon and felony, all witneſſes *for* the priſoner ſhould be examined upon oath, in like manner as the witneſſes *againſt* him.

WHEN the evidence on both ſides is cloſed, and indeed when any evidence hath been given, the jury cannot be diſcharged (unleſs in caſes of evident neceſſity[x]) till they have given in their verdict (11); but are to conſider of it, and deliver it in, with the ſame forms, as upon civil cauſes: only they cannot, in a criminal caſe which touches life or member, give a *privy* verdict[y]. But the judges may adjourn, while the jury are withdrawn to confer, and re-
[361] turn to receive the verdict in open court[z]. And ſuch public or open verdict may be either general, guilty, or not guilty; or ſpecial, ſetting forth all the circumſtances of the caſe, and praying the judgment of the court, whether, for inſtance, on the facts ſtated, it be murder, manſlaughter, or no crime.

[t] Com. Journ. 4. 5. 12, 13. 15. 29. 30. Jun. 1607.
[u] *Ibid* 4 Jun. 1607.
[x] Co. Litt. 227. 3 Inſt. 110. Foſt. 27. Gould's caſe, Hil. 1764.
[y] 2 Hal. P. C. 300. 2 Hawk. P. C. 439.
[z] 3 St. Tr. 731. 4 St. Tr. 231. 455. 485.

(11) It is now ſettled that when a criminal trial runs to ſuch a length, as it cannot be concluded in one day, the court by it's own authority may adjourn till the next morning; but the jury muſt be ſomewhere kept together, that they may have no communication but with each other *Stone's caſe*, 6 *T. R.* 527.

at all. This is where they *doubt* the matter of law, and therefore *chuſe* to leave it to the determination of the court; though they have an unqueſtionable right of determining upon all the circumſtances, and finding a general verdict, if they think proper ſo to hazard a breach of their oaths; and, if their verdict be notoriouſly wrong, they may be puniſhed, and the verdict ſet aſide by attaint at the ſuit of the king; but not at the ſuit of the priſoner[y]. But the practice, heretofore in uſe, of fining, impriſoning, or otherwiſe puniſhing jurors, merely at the diſcretion of the court, for finding their verdict contrary to the direction of the judge, was arbitrary, unconſtitutional, and illegal; and is treated as ſuch by ſir Thomas Smith, two hundred years ago; who accounted "ſuch doings to be very violent, tyrannical, and contrary to "the liberty and cuſtom of the realm of England[z]." For, as ſir Matthew Hale well obſerves[a], it would be a moſt unhappy caſe for the judge himſelf, if the priſoner's fate depended upon his directions:—unhappy alſo for the priſoner; for, if the judge's opinion muſt rule the verdict, the trial by jury would be uſeleſs. Yet in many inſtances[b], where contrary to evidence the jury have found the priſoner guilty, their verdict hath been mercifully ſet aſide, and a new trial granted by the court of king's bench: for in ſuch caſe, as hath been ſaid, it cannot be ſet right by attaint. But there hath yet been no inſtance of granting a new trial, where the priſoner was *acquitted* upon the firſt[c].

If the jury therefore find the priſoner not guilty, he is then for ever quit and diſcharged of the accuſation[d]; except he be appealed of felony within the time limited by law. And [362] upon ſuch his acquittal, or diſcharge for want of proſecution, he ſhall be immediately ſet at large, without payment

[y] 2 Hal. P. C. 310.
[z] Smith's commonw. l. 3. c. 1.
[a] 2 Hal. P. C. 313.
[b] 1 Lev. 9. T. Jones, 163. St. Tr. X. 416.
[c] 2 Hawk. P. C. 442.
[d] The civil law in ſuch caſe only diſcharges him from the ſame accuſer, but not from the ſame accuſation. (*Ff.* 48. 2. 7. § 2.)

of any fee to the gaoler [e]. But if the jury find him guilty [f], he is then ſaid to be *convicted* of the crime whereof he ſtands indicted. Which conviction may accrue two ways; either by his confeſſing the offence and pleading guilty; or by his being found ſo by the verdict of his country.

WHEN the offender is thus convicted, there are two collateral circumſtances that immediately ariſe. 1. On a conviction, (or even upon an acquittal where there was a reaſonable ground to proſecute, and in fact a *bona fide* proſecution,) for any grand or petit larciny or other felony, the reaſonable expences of proſecution, and alſo, if the proſecutor be poor, a compenſation for his trouble and loſs of time, are by ſtatutes 25 Geo. II. c. 36. and 18 Geo. III. c. 19. to be allowed him out of the county ſtock, if he petitions the judge for that purpoſe: and by ſtatute 27 Geo. II. c. 3. explained by the ſame ſtatute 18 Geo. III. c. 19. all perſons appearing upon recognizance or *ſubpœna* to give evidence, whether any indictment be preferred or no, and as well without conviction as with it, are entitled to be paid their charges, with a farther allowance (if poor) for their trouble and loſs of time (12). 2. On a conviction of larciny in particular, the proſecutor ſhall have reſtitution of his goods, by virtue of the ſtatute 21 Hen. VIII. c. 11. For by the common law there was no reſtitution of goods upon an indictment, becauſe it is at the ſuit of the king only; and therefore the party was enforced to bring an appeal of robbery, in order to have his goods again [g]. But, it being conſidered that the party, proſecuting the offender by indictment, deſerves to the full as much encouragement as he who proſecutes by appeal, this ſtatute was made, which enacts, that if any perſon be convicted of larciny by the evidence of the party robbed, he ſhall have full

[e] Stat 14 Geo. III. c. 20.

[f] In the Roman republic, when the priſoner was convicted of any capital offence by his judges, the form of pronouncing that conviction was ſomething peculiarly delicate; not that he was guilty, but that he had not been enough upon his guard; "*parum caviſſe videtur.*" (*Feſtus.* 325.)

[g] 3 Inſt. 242.

(12) But the coſts cannot be allowed the proſecutor out of the county rates in any caſe for a miſdemeanor. 7 *T. R.* 377.

reſti-

reſtitution of his money, goods, and chattels; or the value of them out of the offender's goods, if he has any, by a writ [363] to be granted by the juſtices. And the conſtruction of this act having been in great meaſure conformable to the law of appeals, it has therefore in practice ſuperſeded the uſe of appeals in larciny. For inſtance: as formerly upon appeals [h], ſo now upon indictments of larciny, this writ of reſtitution ſhall reach the goods ſo ſtolen, notwithſtanding the property [i] of them is endeavoured to be altered by ſale in market overt [k]. And though this may ſeem ſomewhat hard upon the buyer, yet the rule of law is that "*ſpoliatus debet, ante omnia, reſtitui;*" eſpecially when he has uſed all the diligence in his power to convict the felon. And, ſince the caſe is reduced to this hard neceſſity, that either the owner or the buyer muſt ſuffer; the law prefers the right of the owner, who has done a meritorious act by purſuing a felon to condign puniſhment, to the right of the buyer, whoſe merit is only negative, that he has been guilty of no unfair tranſaction. And it is now uſual for the court, upon the conviction of a felon, to order (without any writ) immediate reſtitution of ſuch goods, as are brought into court, to be made to the ſeveral proſecutors. Or, elſe, ſecondly, without ſuch writ of reſtitution, the party may peaceably retake his goods, wherever he happens to find them [l], unleſs a new property be fairly acquired therein. Or, laſtly, if the felon be convicted and pardoned, or be allowed his clergy, the party robbed may bring his action of trover againſt him for his goods; and recover a ſatisfaction in damages. But ſuch action lies not before proſecution; for ſo felonies would be made up and healed [m]: and alſo recaption is unlawful, if it be done with intention to ſmother or compound the larciny; it then becoming the heinous offence of theft-bote, as was mentioned in a former chapter [n] (13).

[h] Bracton, *de coron. c.* 32.
[i] See Vol. II. pag. 450.
[k] 1 Hal. P. C. 543.
[l] See Vol. III. pag. 4.
[m] 1 Hal. P. C. 546.
[n] See pag. 133.

(13) The owner of goods ſtolen, who has proſecuted the thief to conviction, cannot recover the value of his goods from a perſon who

It is not uncommon, when a perſon is convicted of a miſdemeſnor, which principally and more immediately affects ſome individual, as a battery, impriſonment, or the like, for the court to permit the defendant to *ſpeak with the proſecutor* [364] before any judgment is pronounced; and, if the proſecutor declares himſelf ſatisfied, to inflict but a trivial puniſhment. This is done to reimburſe the proſecutor his expenſes, and make him ſome private amends, without the trouble and circuity of a civil action. But it ſurely is a dangerous practice: and, though it may be intruſted to the prudence and diſcretion of the judges in the ſuperior courts of record, it ought never to be allowed in local or inferior juriſdictions, ſuch as the quarter-ſeſſions; where proſecutions for aſſaults are by this means too frequently commenced, rather for private lucre than for the great ends of public juſtice. Above all it ſhould never be ſuffered, where the teſtimony of the proſecutor himſelf is neceſſary to convict the defendant: for by this means, the rules of evidence are entirely ſubverted; the proſecutor becomes in effect a plaintiff, and yet is ſuffered to bear witneſs for himſelf. Nay even a voluntary forgiveneſs, by the party injured, ought not in true policy to intercept the ſtroke of juſtice. "This," ſays an elegant writer [o], (who pleads with equal ſtrength for the *certainty* as for the *lenity* of puniſhment,) "may be an act of good nature and humanity, but "it is contrary to the good of the public. For, although a "private citizen may diſpenſe with ſatisfaction for his private "injury, he cannot remove the neceſſity of public example. "The right of puniſhing belongs not to any one individual "in particular, but to the ſociety in general, or the ſove-"reign who repreſents that ſociety: and a man may re-"nounce his own portion of this right, but he cannot give "up that of others."

[o] Becc. ch. 46.

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who has purchaſed them and ſold them again, even with notice of the theft, before conviction. 2 *T. R.* 750.

And if the owner of goods loſes them by a fraud and not by a felony, and afterwards convicts the offender, he is not entitled to reſtitution, or to retain them, againſt a perſon, as a pawnbroker, who has fairly acquired a new right of property in them. 5 *T. R.* 175.

CHAPTER THE TWENTY-EIGHTH.

OF THE BENEFIT OF CLERGY.

AFTER trial and conviction, the judgment of the court regularly follows, unless suspended or arrested by some intervening circumstance; of which the principal is the *benefit of clergy:* a title of no small curiosity as well as use; and concerning which I shall therefore inquire, 1. Into it's original, and the various mutations which this privilege of clergy has sustained. 2. To what persons it is to be allowed at this day. 3. In what cases. 4. The consequences of allowing it.

I. CLERGY, the *privilegium clericale*, or in common speech *the benefit of clergy*, had it's original from the pious regard paid by christian princes to the church in it's infant state; and the ill use which the popish ecclesiastics soon made of that pious regard. The exemptions which they granted to the church, were principally of two kinds: 1. Exemption of *places*, consecrated to religious duties, from criminal arrests, which was the foundation of sanctuaries: 2. Exemption of the *persons* of clergymen from criminal process before the secular judge in a few particular cases, which was the true original and meaning of the *privilegium clericale.*

BUT the clergy, increasing in wealth, power, honour, number, and interest, began soon to set up for themselves: and that which they obtained by the favour of the civil government, they now claimed as their inherent right; and as a

right

right of the higheſt nature, indefeaſable, and *jure divino* [a], By their canons therefore and conſtitutions they endeavoured at, and where they met with eaſy princes obtained, a vaſt extenſion of theſe exemptions: as well in regard to the crimes themſelves, of which the liſt became quite univerſal [b]; as in regard to the perſons exempted, among whom were at length comprehended not only every little ſubordinate officer belonging to the church or clergy, but even many that were totally laymen.

IN England however, although the uſurpations of the pope were very many and grievous, till Henry the eighth entirely exterminated his ſupremacy, yet a total exemption of the clergy from ſecular juriſdiction could never be thoroughly effected, though often endeavoured by the clergy [c]: and therefore, though the antient *privilegium clericale* was in *ſome* capital caſes, yet it was not *univerſally*, allowed. And in thoſe particular caſes, the uſe was for the biſhop or ordinary to demand his clerks to be remitted out of the king's courts, as ſoon as they were indicted: concerning the allowance of which demand there was for many years a great uncertainty [d]: till at length it was finally ſettled in the reign of Henry the ſixth, that the priſoner ſhould firſt be arraigned; and might either *then* claim his benefit of clergy, by way of declinatory plea; or, *after conviction*, by way of arreſting judgment. This latter way is moſt uſually practiſed, as it is more to the ſatisfaction of the court to have the crime previouſly aſcertained by confeſſion or the verdict of a jury; and alſo it is more advantageous to the priſoner himſelf, who may poſſibly be acquitted, and ſo need not the benefit of his clergy at all.

ORIGINALLY the law was held, that no man ſhould be admitted to the privilege of clergy, but ſuch as had the *habi-*
[367] *tum et tonſuram clericalem* [e]. But in proceſs of time a much

[a] The principal argument, upon which they founded this exemption, was that text of ſcripture; "touch not "mine anointed, and do my prophets "no harm." (Keilw. 181.)

[b] See Vol. III. pag. 62.

[c] Keilw. 180.

[d] 2 Hal. P. C. 377.

[e] 2 Hal. P. C. 372. M. Paris, *A. D.* 1259. See Vol. I. pag. 24.

wider and more comprehenſive criterion was eſtabliſhed: every one that could read (a mark of great learning in thoſe days of ignorance and her ſiſter ſuperſtition) being accounted a clerk or *clericus*, and allowed the benefit of clerkſhip, though neither initiated in holy orders, nor trimmed with the clerical tonſure. But when learning, by means of the invention of printing, and other concurrent cauſes, began to be more generally diſſeminated than formerly; and reading was no longer a competent proof of clerkſhip, or being in holy orders; it was found that as many laymen as divines were admitted to the *privilegium clericale*: and therefore by ſtatute 4 Hen. VII. c. 13. a diſtinction was once more drawn between mere lay ſcholars, and clerks that were really in orders. And, though it was thought reaſonable ſtill to mitigate the ſeverity of the law with regard to the former, yet they were not put upon the ſame footing with actual clergy; being ſubjected to a ſlight degree of puniſhment, and not allowed to claim the clerical privilege more than once. Accordingly the ſtatute directs, that no perſon, once admitted to the benefit of clergy, ſhall be admitted thereto a ſecond time, unleſs he produces his orders: and in order to diſtinguiſh their perſons, all laymen who are allowed this privilege ſhall be burnt with a hot iron in the brawn of the left thumb. This diſtinction between learned laymen, and real clerks in orders, was aboliſhed for a time by the ſtatutes 28 Hen. VIII. c. 1. and 32 Hen. VIII. c. 3. but he is held [f] to have been virtually reſtored by ſtatute 1 Edw. VI. c. 12. which ſtatute alſo enacts that lords of parliament and peers of the realm, having place and voice in parliament, may have the benefit of their peerage, equivalent to that of clergy, for the firſt offence, (although they cannot read, and without being burnt in the hand,) for all offences then clergyable to commoners, and alſo for the crimes of houſe-breaking, highway-robbery, horſe-ſtealing, and robbing of churches (1).

[f] Hob. 294. 2 Hal. P. C. 375.

(1) Upon the conviction of the ducheſs of Kingſton for bigamy, it was argued by the attorney-general Thurlow, that peereſſes were

of clergy, for they were not called upon to read; but) be burned in the hand, and whipped, ſtocked, or impriſoned for any time not exceeding a year. And a ſimilar indulgence, by the ſtatutes 3 & 4 W. & M. c. 9. and 4 & 5 W. & M. c. 24. was extended to women, guilty of any clergyable felony whatſoever; who were allowed once to claim the benefit of the *ſtatute*, in like manner as men might claim the benefit of *clergy*, and to be diſcharged upon being burned in the hand, and impriſoned for any time not exceeding a year. The puniſhment of burning in the *hand* being found ineffectual, was alſo changed by ſtatute 10 & 11 W. III. c. 23.
[370] into burning in the moſt viſible part of the left *cheek*, neareſt the noſe: but, ſuch an indelible ſtigma being found by experience to render offenders deſperate, this proviſion was repealed about ſeven years afterwards, by ſtatute 5 Ann. c. 6. and, till that period, all women, all peers of parliament and peereſſes, and all male commoners who could read, were diſcharged in all clergyable felonies; the males abſolutely, if clerks in orders; and other commoners, both male and female, upon branding, and peers and peereſſes without branding, for the firſt offence: yet all liable (excepting peers and peereſſes) if the judge ſaw occaſion, to impriſonment not exceeding a year. And thoſe men, who could not read, if under the degree of peerage, were hanged.

AFTERWARDS indeed it was conſidered, that education and learning were no extenuations of guilt, but quite the reverſe: and that, if the puniſhment of death for ſimple felony was too ſevere for thoſe who had been liberally inſtructed, it was, *a fortiori*, too ſevere for the ignorant alſo. And thereupon by the ſame ſtatute 5 Ann. c. 6. it was enacted, that the benefit of clergy ſhould be granted to all thoſe who were entitled to aſk it, without requiring them to read by way of conditional merit (2). And experience having ſhewn, that ſo

(2) The ſtatute enacts, that if a perſon convicted of a clergyable offence *ſhall pray the benefit of this act*, he ſhall not be required to read, but ſhall be taken to be, and puniſhed as, a clerk convict. Hence perſons convicted of manſlaughters, bigamies, and ſimple grand larcinies, *&c.* are ſtill aſked what they have to ſay why judgment

very univerſal a lenity was frequently inconvenient, and an encouragement to commit the lower degrees of felony; and that, though capital puniſhments were too rigorous for theſe inferior offences, yet no puniſhment at all (or next to none) was as much too gentle; it was farther enacted by the ſame ſtatute, that when any perſon is convicted of any theft or larciny, and burnt in the hand for the ſame according to the antient law, he ſhall alſo, at the diſcretion of the judge, be committed to the houſe of correction or public workhouſe, to be there kept to hard labour, for any time not leſs than ſix months, and not exceeding two years; with a power of inflicting a double confinement in caſe of the party's eſcape from the firſt. And it was alſo enacted by the ſtatutes 4 Geo. I. c. 11. and 6 Geo. I. c. 23. that when any perſons ſhall be convicted of any larciny, either grand or petit, or any felonious ſtealing or taking of money or goods and chattels either from the perſon or the houſe of any other, or in any other manner, and who by the law ſhall be entitled to the benefit of clergy, and liable only to the penalties of burning in the hand or whipping, the court in their diſcretion, inſtead of ſuch burning in the hand or whipping, may direct ſuch offenders to be tranſported to America (or, by ſtatute 19 Geo. III. c. 74. to any other parts beyond the ſeas) for ſeven years: and if they return or are ſeen at large in this kingdom within that time, it ſhall be felony without benefit of clergy. And by the ſubſequent ſtatutes 16 Geo. II. c. 15. and 8 Geo. III. c. 15. many wiſe proviſions are made for the more ſpeedy and effectual execution of the laws relating to tranſportation, and the conviction of ſuch as tranſgreſs them. But now, by the ſtatute 19 Geo. III. c. 74. all offenders liable to tranſportation may in lieu thereof, at the diſcretion of the judges, be employed, if males (except in the caſe of

ment of death ſhould not be pronounced upon them? And they are then told to kneel down and pray the benefit of the ſtatute. It would perhaps have been more conſiſtent with the dignity of a court of juſtice to have granted the benefit of clergy, without requiring an unneceſſary form, the meaning of which very few comprehend.

petty larciny) in hard labour for the benefit of ſome public navigation; or, whether males or females, may in all caſes be confined to hard labour in certain penitentiary houſes, to be erected by virtue of the ſaid act, for the ſeveral terms therein ſpecified, but in no caſe exceeding ſeven years; with a power of ſubſequent mitigation, and even of reward, in caſe of their good behaviour. But if they eſcape and are re-taken, for the firſt time an addition of three years is made
[371] to the term of their confinement; and a ſecond eſcape is felony without benefit of clergy.

IN forming the plan of theſe penitentiary houſes, the principal objects have been, by ſobriety, cleanlineſs, and medical aſſiſtance, by a regular ſeries of labour, by ſolitary confinement during the intervals of work, and by due religious inſtruction, to preſerve and amend the health of the unhappy offenders, to inure them to habits of induſtry, to guard them from pernicious company, to accuſtom them to ſerious reflection, and to teach them both the principles and practice of every chriſtian and moral duty. And if the whole of this plan be properly executed, and it's defects be timely ſupplied, there is reaſon to hope that ſuch a reformation may be effected in the lower claſſes of mankind, and ſuch a gradual ſcale of puniſhment be affixed to all gradations of guilt, as may in time ſuperſede the neceſſity of capital puniſhment, except for very atrocious crimes.

IT is alſo enacted by the ſame ſtatute, 19 Geo. III. c. 74. that inſtead of burning in the hand (which was ſometimes too ſlight and ſometimes too diſgraceful a puniſhment) the court in all clergyable felonies may impoſe a pecuniary fine; or (except in the caſe of manſlaughter) may order the offender to be once or oftener, but not more than thrice, either publicly or privately whipped; ſuch private whipping (to prevent colluſion or abuſe) to be inflicted in the preſence of two witneſſes, and in caſe of female offenders in the preſence of females only. Which fine or whipping ſhall have the ſame conſequences as burning in the hand; and the offender,

fender, ſo fined or whipped, ſhall be equally liable to a ſubſequent detainer or impriſonment.

IN this ſtate does the benefit of clergy at preſent ſtand; very conſiderably different from it's original inſtitution: the wiſdom of the Engliſh legiſlature having, in the courſe of a long and laborious proceſs, extracted by a noble alchemy rich medicines out of poiſonous ingredients; and converted, by gradual mutations, what was at firſt an unreaſonable exemption of particular popiſh eccleſiaſtics, into a merciful mitigation of the general law, with reſpect to capital puniſhment.

FROM the whole of this detail we may collect, that however in times of ignorance and ſuperſtition that monſter in true policy may for a while ſubſiſt, of a body of men, reſiding in the bowels of a ſtate, and yet independent of it's laws; yet, when learning and rational religion have a little enlightened men's minds, ſociety can no longer endure an abſurdity ſo groſs, as muſt deſtroy it's very fundamentals. For, by the original contract of government, the price of protection by the united force of individuals is that of obedience to the united will of the community. This united will is declared in the laws of the land: and that united force is exerted in their due, and univerſal, execution.

II. I AM next to inquire to what *perſons* the benefit of clergy is to be allowed at this day: and this muſt be chiefly collected from what has been obſerved in the preceding article. For, upon the whole, we may pronounce, that all clerks in orders are, without any branding, and of courſe without any tranſportation, fine, or whipping, (for thoſe are only ſubſtituted in lieu of the other,) to be admitted to this privilege, and immediately diſcharged; and this as often as they offend[1] (3). Again, all lords of parliament and peers

[1] 2 Hal. P. C. 375.

(3) But clergymen have no privilege in petty larcinies, but they are liable to be whipped or tranſported, like other perſons, for a

of the realm having place and voice in parliament, by the ſtatute 1 Edw. VI. c. 12. (which is likewiſe held to extend to peereſſes [k],) ſhall be diſcharged in all clergyable and other
[372] felonies, provided for by the act, without any burning in the hand or impriſonment, or other puniſhment ſubſtituted in it's ſtead, in the ſame manner as real clerks convict: but this is only for the firſt offence. Laſtly, all the commons of the realm, not in orders, whether male or female, ſhall for the firſt offence be diſcharged of the capital puniſhment of felonies within the benefit of clergy, upon being burnt in the hand, whipped, or fined, or ſuffering a diſcretionary impriſonment in the common gaol, the houſe of correction, one of the penitentiary houſes, or in the places of labour for the benefit of ſome navigation; or, in caſe of larciny, upon being tranſported for ſeven years, if the court ſhall think proper (4). It hath been ſaid, that Jews, and other infidels and heretics, were not capable of the benefit of clergy, till after the ſtatute 5 Ann. c. 6. as being under a legal incapacity for orders [l]. But I much queſtion whether this was ever ruled for law, ſince the re-introduction of the Jews into England, in the time of Oliver Cromwell. For, if that were the caſe, the Jews are ſtill in the ſame predicament, which every day's experience will contradict: the ſtatute of queen Anne having certainly made no alteration in this reſpect; it

[k] Ducheſs of Kingſton's caſe, in parliament, 22 Apr. 1776.

[l] 2 Hal. P. C. 373. 2 Hawk. P. C. 338. Foſt. 306.

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petty larciny, though they are ſubject to no corporal puniſhment whatever, upon being convicted of a grand larciny or any clergyable felony.

(4) A layman, who has once had the benefit of clergy, may be precluded from obtaining it a ſecond time, by a counter-plea on the part of the proſecution, averring the identity of the priſoner's perſon, and that he had before been allowed the benefit of his clergy, though the ſecond crime be quite different from the firſt. As a perſon convicted of bigamy is liable to ſuffer death for a manſlaughter, or any other clergyable felony. *Scott's caſe, Leach*, 312.

only

only dispensing with the necessity of reading in those persons, who, in case they could read, were before the act entitled to the benefit of their clergy.

III. THE third point to be considered is, for what *crimes* the *privilegium clericale*, or benefit of clergy, is to be allowed. And, it is to be observed, that neither in high treason, nor in petit larciny, nor in any mere misdemesnors, it was indulged at the common law; and therefore we may lay it down for a rule, that it was allowable only in petit treason and capital felonies: which for the most part became legally intitled to this indulgence by the statute *de clero*, 25 Edw. III. st. 3. c. 4. which provides that clerks convict for treasons or felonies, touching other persons than the king himself or his royal majesty, shall have the privilege of holy church. But yet it was not allowable in all felonies whatsoever: for in some it was denied even by the common law, viz. *insidiatio viarum*, or lying in wait for one on the highway; *depopulatio agrorum*, or destroying and ravaging a country [l]; and *combustio domorum*, or arson, that is, the burning of houses [m]; all which are a kind of hostile acts, and in some degree border upon treason. And [373] farther, all these identical crimes, together with petit treason, and very many other acts of felony, are ousted of clergy by particular acts of parliament; which have in general been mentioned under the particular offences to which they belong, and therefore need not be here recapitulated. Upon all which statutes for excluding clergy I shall only observe, that they are nothing else but the restoring of the law to the same rigor of capital punishment in the first offence, that is exerted before the *privilegium clericale* was at all indulged; and which it still exerts upon a second offence in almost all kinds of felonies, unless committed by clerks actually in orders. But so tender is the law of inflicting capital punishment in the first instance for any inferior felony, that notwithstanding by the marine law, as declared in statute 28 Hen. VIII. c. 15. the benefit of clergy is not allowed in any case whatsoever;

[l] 2 Hal. P. C. 333. [m] 1 Hal. P. C. 346.

yet, when offences are committed within the admiralty-jurisdiction, which would be clergyable if committed by land, the constant course is to acquit and discharge the prisoner[n]. And, to conclude this head of inquiry, we may observe the following rules: 1. That in all felonies, whether new created or by common law, clergy is now allowable, unless taken away by express words of an act of parliament[o]. 2. That, where clergy is taken away from the principal, it is not of course taken away from the accessory, unless he be also particularly included in the words of the statute[p]. 3. That, when the benefit of clergy is taken away from the *offence*, (as in case of murder, buggery, robbery, rape, and burglary,) a principal in the second degree, being present, aiding, and abetting the crime, is as well excluded from his clergy as he that is principal in the first degree: but, 4. That, where it is only taken away from the *person committing* the offence, (as in the case of stabbing, or committing larciny in a dwelling-house (5), or privately from the person,) his aiders and abettors are not excluded; through the tenderness of the law, which hath determined that such statutes shall be taken literally[q].

[374] IV. LASTLY, we are to inquire what the consequences are to the party, of allowing him this benefit of clergy. I speak not of the branding, fine, whipping, imprisonment, or transportation; which are rather concomitant conditions, than consequences of receiving this indulgence. The consequences are such as affect his present interest, and future credit and capacity: as having been once a felon, but now purged from that guilt by the privilege of clergy; which operates as a kind of statute pardon.

[n] Moor, 756. Foft. 288.
[o] 2 Hal. P. C. 350.
[p] 2 Hawk. P. C. 341.
[q] 1 Hal. P. C. 529. Foster 356, 357.

(5) In the case of all capital larcinies in a dwelling-house, the benefit of clergy has been taken away, as well from those who aid, assist, and abet, as from those who actually commit the crime, by 3 *W.* & *M.* *c.* 9. and 12 *Ann.* *ſt.* 1. *c.* 7. See p. 240. *ante.*

AND,

AND, we may obſerve, 1. That by this conviction he forfeits all his goods to the king; which, being once veſted in the crown, ſhall not afterwards be reſtored to the offender [r]. 2. That, after conviction, and till he receives the judgment of the law, by branding or ſome of it's ſubſtitutes, or elſe is pardoned by the king, he is to all intents and purpoſes a felon, and ſubject to all the diſabilities and other incidents of a felon [s]. 3. That, after burning or it's ſubſtitute, or pardon, he is diſcharged for ever of that, and all other felonies before committed, within the benefit of clergy; but not of felonies from which ſuch benefit is excluded: and this by ſtatutes 8 Eliz. c. 4. and 18 Eliz. c. 7. 4. That by the burning, or it's ſubſtitute, or the pardon of it, he is reſtored to all capacities and credits, and the poſſeſſion of his lands, as if he had never been convicted [t]. 5. That what is ſaid with regard to the advantages of commoners and laymen, ſubſequent to the burning in the hand, is equally applicable to all peers and clergymen, although never branded at all, or ſubjected to other puniſhment in it's ſtead. For they have the ſame privileges, without any burning, or any ſubſtitute for it, which others are entitled to after it [u].

[r] 2 Hal. P. C. 388.
[s] 3 P. Wms. 487.
[t] 2 Hal. P. C. 389. 5 Rep. 110.
[u] 2 Hal. P. C. 389, 390.

CHAPTER THE TWENTY-NINTH.

OF JUDGMENT AND IT'S CONSEQUENCES.

WE are now to conſider the next ſtage of criminal proſecution, after trial and conviction are paſt, in ſuch crimes and miſdemeſnors, as are either too high or too low to be included within the benefit of clergy: which is that of *judgment*. For when, upon a capital charge, the jury have brought in their verdict guilty, in the preſence of the priſoner; he is either immediately, or at a convenient time ſoon after, aſked by the court, if he has any thing to offer why judgment ſhould not be awarded againſt him. And in caſe the defendant be found guilty of a miſdemeſnor, (the trial of which may, and does uſually, happen in his abſence, after he has once appeared,) a *capias* is awarded and iſſued, to bring him in to receive his judgment; and, if he abſconds, he may be proſecuted even to outlawry. But whenever he appears in perſon, upon either a capital or inferior conviction, he may at this period, as well as at his arraignment, offer any exceptions to the indictment, in *arreſt* or ſtay of judgment: as for want of ſufficient certainty in ſetting forth either the perſon, the time, the place, or the offence. And, if the objections be valid, the whole proceedings ſhall be ſet aſide; but the party may be indicted again [a]. And we may take notice, 1. That none of the ſtatutes of *jeofails* [b], for amendment of errors, extend to indictments or proceedings in cri-

[a] 4 Rep. 45.

[b] See Vol. III. pag. 407.

minal

minal cases; and therefore a defective indictment is not aided by a verdict, as defective pleadings in civil cases are. 2. That, in favour of life, great strictness has at all times been observed, in every point of an indictment. Sir Matthew Hale indeed complains, "that this strictness is grown to be a "blemish and inconvenience in the law, and the administra- "tion thereof: for that more offenders escape by the over- "easy ear given to exceptions in indictments, than by their [376] "own innocence[c]." And yet no man was more tender of life than this truly excellent judge.

A PARDON also, as has been before said, may be pleaded in arrest of judgment: and it has the same advantage when pleaded here, as when pleaded upon arraignment; *viz.* the saving the attainder, and of course the corruption of blood: which nothing can restore but parliament, when a pardon is not pleaded till after sentence. And certainly, upon all accounts, when a man hath obtained a pardon, he is in the right to plead it as soon as possible.

PRAYING the benefit of clergy may also be ranked among the motions in arrest of judgment: of which we spoke largely in the preceding chapter.

IF all these resources fail, the court must pronounce that judgment, which the law hath annexed to the crime, and which hath been constantly mentioned, together with the crime itself, in some or other of the former chapters. Of these some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead; though in very atrocious crimes other circumstances of terror, pain, or disgrace are superadded: as, in treasons of all kinds, being drawn or dragged to the place of execution; in high treason affecting the king's person or government, embowelling alive, beheading, and quartering; and in murder, a public dissection. And, in case of any treason com-

[c] 2 Hal. P. C. 193.

mitted

mitted by a female, the judgment is to be burned alive (1). But the humanity of the Engliſh nation has authorized, by a tacit conſent, an almoſt general mitigation of ſuch part of theſe judgments, as ſavours of torture or cruelty: a ſledge or hurdle
[377] being uſually allowed to ſuch traitors as are condemned to be drawn; and there being very few inſtances (and thoſe accidental or by negligence) of any perſons being embowelled or burned, till previouſly deprived of ſenſation by ſtrangling. Some puniſhments conſiſt in exile or baniſhment, by abjuration of the realm, or tranſportation: others in loſs of liberty, by perpetual or temporary impriſonment. Some extend to confiſcation, by forfeiture of lands, or moveables, or both, of of the profits of lands for life: others induce a diſability, of holding offices or employments, being heirs, executors, and the like. Some, though rarely, occaſion a mutilation or diſmembering, by cutting off the hand or ears: others fix a laſting ſtigma on the offender, by ſlitting the noſtrils, or branding in the hand or cheek. Some are merely pecuniary, by ſtated or diſcretionary fines: and laſtly there are others, that conſiſt principally in their ignominy, though moſt of them are mixed with ſome degree of corporal pain; and theſe are inflicted chiefly for ſuch crimes, as either ariſe from indigence, or render even opulence diſgraceful. Such as whipping, hard labour in the houſe of correction or otherwiſe, the pillory, the ſtocks, and the ducking-ſtool.

DISGUSTING as this catalogue may ſeem, it will afford pleaſure to an Engliſh reader, and do honour to the Engliſh law, to compare it with that ſhocking apparatus of death and torment, to be met with in the criminal codes of almoſt every other nation in Europe. And it is moreover one of the glories of our Engliſh law, that the ſpecies, though not always the quantity or degree, of puniſhment is *aſcertained* for every offence; and that it is not left in the breaſt of any

(1) But this is now altered by 30 Geo. III. c. 48. See p. 204. n. 7. *ante*.

judge,

judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained, for every ſubject alike, without reſpect of perſons. For, if judgments were to be the private opinions of the judge, men would then be ſlaves to their magiſtrates; and would live in ſociety, without knowing exactly the conditions and obligations which it lays them under. And beſides, as this prevents oppreſſion on the one hand, ſo on the other it ſtifles all hopes of impunity or mitigation; with which an offender might flatter himſelf, [378] if his puniſhment depended on the humour or diſcretion of the court. Whereas, where an eſtabliſhed penalty is annexed to crimes, the criminal may read their certain conſequence in that law, which ought to be the unvaried rule, as it is the inflexible judge, of his actions.

THE diſcretionary fines and diſcretionary length of impriſonment, which our courts are enabled to impoſe, may ſeem an exception to this rule. But the general nature of the puniſhment, *viz.* by fine or impriſonment, is, in theſe caſes, fixed and determinate: though the duration and quantity of each muſt frequently vary, from the aggravations or otherwiſe of the offence, the quality and condition of the parties, and from innumerable other circumſtances. The *quantum*, in particular, of pecuniary fines neither can, nor ought to be, aſcertained by any invariable law. The value of money itſelf changes from a thouſand cauſes; and, at all events, what is ruin to one man's fortune, may be matter of indifference to another's. Thus the law of the twelve tables at Rome fined every perſon, that ſtruck another, five and twenty *denarii*: this, in the more opulent days of the empire, grew to be a puniſhment of ſo little conſideration, that Aulus Gellius tells a ſtory of one Lucius Neratius, who made it his diverſion to give a blow to whomſoever he pleaſed, and then tender them the legal forfeiture. Our ſtatute law has not therefore often aſcertained the quantity of fines, nor the common law ever; it directing ſuch an offence to be puniſhed by fine in general, without ſpecifying the certain ſum; which is fully ſufficient, when we conſider, that how-

ever unlimited the power of the court may ſeem, it is far from being wholly arbitrary; but it's diſcretion is regulated by law. For the bill of rights[d] has particularly declared, that exceſſive fines ought not to be impoſed, nor cruel and unuſual puniſhments inflicted: (which had a retroſpect to ſome unprecedented proceedings in the court of king's bench, in the reign of king James the ſecond:) and the ſame ſtatute
[379] farther declares, that all grants and promiſes of fines and forfeitures of particular perſons, before conviction, are illegal and void. Now the bill of rights was only declaratory of the old conſtitutional law: and accordingly we find it expreſsly holden, long before[e], that all ſuch previous grants are void; ſince thereby many times undue means, and more violent proſecution, would be uſed for private lucre, than the quiet and juſt proceeding of law would permit.

THE reaſonableneſs of fines in criminal caſes has alſo been uſually regulated by the determination of *magna carta*, c. 14. concerning amercements for miſbehaviour by the ſuiters in matters of civil right. "*Liber homo non amercie-*"*tur pro parvo delicto, niſi ſecundum modum ipſius delicti; et* "*pro magno delicto, ſecundum magnitudinem delicti; ſalvo* "*contenemento ſuo; et mercator eodem modo, ſalva mercandiſa* "*ſua; et villanas eodem modo, amercietur, ſalvo wainagio ſuo.*" A rule, that obtained even in Henry the ſecond's time[f], and means only, that no man ſhall have a larger amercement impoſed upon him, than his circumſtances or perſonal eſtate will bear; ſaving to the landholder his contenement (2), or

[d] Stat 1 W. & M. ſt. 2. c. 2.
[e] 2 Inſt. 48.
[f] Glanv. l. 9. c. 8. & 11.

(2) Lord Coke ſays, that "contenement ſignifieth his counte-"nance, as the armour of a ſoldier is his countenance, the books "of a ſcholar his countenance, and the like." 2 *Inſt.* 28. He alſo adds, that "the *wainagium* is the countenance of the villain, "and it was great reaſon to ſave his wainage, for otherwiſe the "miſerable creature was to carry the burden on his back." *Ibid.*

land;

land; to the trader his merchandize; and to the countryman his wainage, or team and inſtruments of huſbandry. In order to aſcertain which, the great charter alſo directs, that the amercement, which is always inflicted in general terms ("*ſit in miſericordia*") ſhall be ſet, *ponatur*, or reduced to a certainty by the oath of good and lawful men of the neighbourhood. Which method, of liquidating the amercement to a preciſe ſum, was uſually performed in the ſuperior courts by the aſſeſſment or *affeerment* of the coroner, a ſworn officer choſen by the neighbourhood, under the equity of the ſtatute Weſtm. 1. c. 18; and then the judges eſtreated them into the exchequer[g]. But in the court leet and court baron it is ſtill performed by *affeerors*, or ſuitors ſworn to *affeere*, that is, tax and moderate the *general* amercement according to the *particular* circumſtances of the offence and the offender[h]. Amercements impoſed by the ſuperior courts [380] on their own officers and miniſters were affeered by the judges themſelves; but when a pecuniary mulct was inflicted by them on a ſtranger (not being party to any ſuit) it was then denominated a *fine*[i]; and the antient practice was, when any ſuch fine was impoſed, to inquire by a jury "*quantum inde regi dare valeat per annum, ſalva ſuſtentatione "ſua, et uxoris, et liberorum ſuorum*]." And ſince the diſuſe of ſuch inqueſt, it is never uſual to aſſeſs a larger fine than a man is able to pay, without touching the implements of his livelihood; but to inflict corporal puniſhment, or a limited impriſonment, inſtead of ſuch fine as might amount to impriſonment for life. And this is the reaſon why fines in the king's court are frequently denominated ranſoms, becauſe the penalty muſt otherwiſe fall upon a man's perſon, unleſs it be redeemed or ranſomed by a pecuniary fine[k]: according to an antient maxim, *qui non habet in crumena luat in corpore*. Yet, where any ſtatute ſpeaks both of fine and ran-

[g] F.N.B. 76.

[h] The affeeror's oath is conceived in the very terms of *magna carta*. Fitzh. Survey, ch. 11.

[i] 8 Rep. 40.

[j] Gilb. Exch. c. 5.

[k] Mirr. c. 5. § 3. Lamb. *Eirenarch.* 575.

fom, it is holden, that the ranſom ſhall be treble to the fine at leaſt [l].

WHEN ſentence of death, the moſt terrible and higheſt judgment in the laws of England, is pronounced, the immediate inſeparable conſequence from the common law is *attainder*. For when it is now clear beyond all diſpute, that the criminal is no longer fit to live upon the earth, but is to be exterminated as a monſter and a bane to human ſociety, the law ſets a note of infamy upon him, puts him out of it's protection, and takes no farther care of him than barely to ſee him executed. He is then called attaint, *attinctus*, ſtained or blackened. He is no longer of any credit or reputation; he cannot be a witneſs in any court; neither is he capable of performing the functions of another man: for, by an anticipation of his puniſhment, he is already dead in law [m]. This is after *judgment*: for there is great difference between a man *convicted* and *attainted*; though they are frequently
[381] through inaccuracy confounded together. After conviction only, a man is liable to none of theſe diſabilities: for there is ſtill in contemplation of law a poſſibility of his innocence. Something may be offered in arreſt of judgment: the indictment may be erroneous, which will render his guilt uncertain, and thereupon the preſent conviction may be quaſhed: he may obtain a pardon, or be allowed the benefit of clergy: both which ſuppoſe ſome latent ſparks of merit, which plead in extenuation of his fault. But when judgment is once pronounced, both law and fact conſpire to prove him completely guilty; and there is not the remoteſt poſſibility left of any thing to be ſaid in his favour. Upon judgment therefore of death, and not before, the attainder of a criminal commences: or upon ſuch circumſtances as are equivalent to judgment of death; as judgment of outlawry on a capital crime, pronounced for abſconding or fleeing from juſtice, which tacitly confeſſes the guilt. And therefore either upon judgment of outlawry, or of death, for treaſon or felony, a man ſhall be ſaid to be attainted.

[l] Dyer, 232. [m] 3 Inſt. 213.

THE

THE conſequences of attainder are forfeiture and corruption of blood.

I. FORFEITURE is twofold; of real, and perſonal eſtates. Firſt, as to real eſtates: by attainder in high treaſon [n] a man forfeits to the king all his lands and tenements of inheritance, whether fee-ſimple or fee-tail, and all his rights of entry on lands and tenements, which he had at the time of the offence committed, or at any time afterwards, to be for ever veſted in the crown: and alſo the profits of all lands and tenements, which he had in his own right for life or years, ſo long as ſuch intereſt ſhall ſubſiſt. This forfeiture relates backwards to the time of the treaſon committed: ſo as to avoid all intermediate ſales and incumbrances [o], but not thoſe before the fact: and therefore a wife's jointure is not forfeitable for the treaſon of her huſband; becauſe ſettled upon her previous to the treaſon committed. But her dower is forfeited by the expreſs proviſion of ſtatute 5 & 6 Edw. VI. c. 11. And yet the huſband ſhall be tenant by the curteſy of the wife's lands, if the wife be attainted of treaſon [p]: for that is not prohibited by the ſtatute. But, though after attainder the forfeiture relates back to the time of the treaſon committed, yet it does not take effect unleſs an attainder be had, of which it is one of the fruits: and therefore if a traitor dies before judgment pronounced, or is killed in open rebellion, or is hanged by martial law, it works no forfeiture of his lands: for he never was attainted of treaſon [q]. But if the chief juſtice of the king's bench (the ſupreme coroner of all England) in perſon, upon the view of the body of one killed in open rebellion, records it and returns the record into his own court, both lands and goods ſhall be forfeited [r]. [382]

THE natural juſtice of forfeiture or confiſcation of property, for treaſon [s], is founded on this conſideration: that

[n] Co. Litt. 392. 3 Inſt. 19. 1 Hal. P. C. 240. 2 Hawk. P. C. 448.
[o] 3 Inſt. 211.
[p] 1 Hal. P. C. 359.
[q] Co. Litt. 13.
[r] 4 Rep. 57.
[s] See Vol. I. pag. 259.

he

he who hath thus violated the fundamental principles of government, and broken his part of the original contract between king and people, hath abandoned his connections with ſociety; and hath no longer any right to thoſe advantages, which before belonged to him purely as a member of the community: among which *ſocial* advantages the right of tranſferring or tranſmitting property to others is one of the chief. Such forfeitures moreover, whereby his poſterity muſt ſuffer as well as himſelf, will help to reſtrain a man, not only by the ſenſe of his duty, and dread of perſonal puniſhment, but alſo by his paſſions and natural affections; and will intereſt every dependent and relation he has, to keep him from offending: according to that beautiful ſentiment of Cicero [s], "*nec vero me fugit quam ſit acerbum, parentum ſcelera filiorum* "*poenis lui: ſed hoc praeclare legibus comparatum eſt, ut caritas* "*liberorum amiciores parentes reipublicae redderet.*" And therefore Aulus Caſcellius, a Roman lawyer in the time of the triumvirate, uſed to boaſt that he had two reaſons for deſpiſing the power of the tyrants; his old age, and his want [383] of children: for children are pledges to the prince of the father's obedience [t]. Yet many nations have thought, that this poſthumous puniſhment ſavours of hardſhip to the innocent; eſpecially for crimes that do not ſtrike at the very root and foundation of ſociety, as treaſon againſt the government expreſsly does. And therefore, though confiſcations were very frequent in the times of the earlier emperors, yet Arcadius and Honorius in every other inſtance but that of treaſon thought it more juſt, "*ibi eſſe poenam, ubi et noxa eſt;*" and ordered that "*peccata ſuos teneant auctores, nec ulterius progre-* "*diatur metus, quam reperiatur delictum* [v]:" and Juſtinian alſo made a law to reſtrain the puniſhment of relations [w]; which directs the forfeiture to go, except in the caſe of *crimen majeſtatis*, to the next of kin to the delinquent. On the other hand the Macedonian laws extended even the capital puniſhment of treaſon, not only to the children but to all the

[s] *ad Brutum, ep.* 12.
[t] Gravin. 1. § 68.
[v] *Cod.* 9. 47. 22.
[w] *Nov.* 134. *c.* 13.

relations

relations of the delinquent[w]: and of courſe their eſtates muſt be alſo forfeited, as no man was left to inherit them. And in Germany, by the famous golden bulle[x], (copied almoſt *verbatim* from Juſtinian's code[y],) the lives of the ſons of ſuch as conſpire to kill an elector are ſpared, as it is expreſſed, by the emperor's *particular bounty*. But they are deprived of all their effects and rights of ſucceſſion, and are rendered incapable of any honor eccleſiaſtical or civil: "to the end "that, being always poor and neceſſitous, they may for ever "be accompanied by the infamy of their father: may languiſh in continual indigence; and may find (ſays this "mercileſs edict) their puniſhment in living, and their re"lief in dying."

WITH us in England, forfeiture of lands and tenements to the crown for treaſon is by no means derived from the feodal policy, (as has been already obſerved[z],) but was antecedent to the eſtabliſhment of that ſyſtem in this iſland; being tranſmitted from our Saxon anceſtors[a], and forming a [384] part of the antient Scandinavian conſtitution[b]. But in certain treaſons relating to the coin, (which, as we formerly obſerved, ſeem rather a ſpecies of the *crimen falſi*, than the *crimen laeſae majeſtatis*,) it is provided by ſome of the modern ſtatutes[c] which conſtitute the offence, that it ſhall work no forfeiture of lands, ſave only for the life of the offender; and by all, that it ſhall not deprive the wife of her dower[d]. And, in order to aboliſh ſuch hereditary puniſhment entirely, it was enacted by ſtatute 7 Ann. c. 21. that after the deceaſe of the late pretender, no attainder for treaſon ſhould extend to the diſinheriting of any heir, nor to the prejudice of any perſon, other than the traitor himſelf. By which, the law of forfeitures for high treaſon would by this time have been at an end, had not a ſubſequent ſtatute intervened to give

[w] Qu. Curt. *l.* 6.
[x] *cap.* 24.
[y] *l.* 9. *t.* 8. *l.* 5.
[z] See Vol. II. pag. 251.
[a] *LL. Aelfr. c.* 4. *Canut. c.* 54.
[b] Stiernh. *de jure Goth. l.* 2. *c.* 6. & *l.* 3. *c.* 3.
[c] Stat. 5 Eliz. *c.* 11. 18 Eliz. c. 1.
[d] *Ibid.* 8 & 9 Will. III. c. 26. 15 & 16 Geo. II. c. 29.

them a longer duration. The hiſtory of this matter is ſomewhat ſingular and worthy obſervation. At the time of the union, the crime of treaſon in Scotland was, by the Scots law, in many reſpects different from that of treaſon in England; and particularly in it's conſequence of forfeitures of entailed eſtates, which was more peculiarly Engliſh; yet it ſeemed neceſſary that a crime ſo nearly affecting government ſhould, both in it's eſſence and conſequences, be put upon the ſame footing in both parts of the united kingdoms. In new-modelling theſe laws, the Scotch nation and the Engliſh houſe of commons ſtruggled hard, partly to maintain, and partly to acquire, a total immunity from forfeiture and corruption of blood: which the houſe of lords as firmly reſiſted. At length a compromiſe was agreed to, which is eſtabliſhed by this ſtatute, *viz.* that the ſame crimes, and no other, ſhould be treaſon in Scotland that are ſo in England; and that the Engliſh forfeitures and corruption of blood ſhould take place in Scotland, till the death of the then pretender; and then ceaſe throughout the whole of Great Britain[e]: the lords artfully propoſing this temporary clauſe, in
[385] hopes (it is ſaid[f]) that the prudence of ſucceeding parliaments would make it perpetual[g]. This has partly been done by the ſtatute 17 Geo. II. c. 39. (made in the year preceding the late rebellion) the operation of theſe indemnifying clauſes being thereby ſtill farther ſuſpended, till the death of the ſons of the pretender[h] (3).

[e] Burnet's Hiſt. *A. D.* 1709.

[f] Conſiderations on the law of forfeiture, 6.

[g] See Foſt. 250.

[h] The juſtice and expediency of this proviſion were defended at the time, with much learning and ſtrength of argument, in the *conſiderations on the law of forfeiture*, firſt publiſhed *A. D.* 1744. (See Vol. I. pag. 244.)

(3) By the 39 Geo. III. c. 93. the clauſe in the 7 Ann. c. 21. and that in the 17 Geo. II. c. 39. limiting the periods when forfeiture for treaſon ſhould be aboliſhed, are repealed. So the law of forfeiture in caſes of high treaſon is now the ſame as it was by the common law, or as it ſtood prior to the ſeventh year of the reign of queen Anne.

In petit treaſon and felony, the offender alſo forfeits all his chattel intereſts abſolutely, and the profits of all eſtates of freehold during life; and, after his death, all his lands and tenements in fee ſimple (but not thoſe in tail) to the crown, for a very ſhort period of time: for the king ſhall have them for a year and a day, and may commit therein what waſte he pleaſes; which is called the king's *year, day,* and *waſte*[i]. Formerly the king had only a liberty of committing waſte on the lands of felons, by pulling down their houſes, extirpating their gardens, ploughing their meadows, and cutting down their woods. And a puniſhment of a ſimilar ſpirit appears to have obtained in the oriental countries, from the decrees of Nebuchadnezzar and Cyrus in the books of Daniel[k] and Ezra[l]; which, beſides the pain of death inflicted on the delinquents there ſpecified, ordain, "that their houſes ſhall be made a dunghill." But this tending greatly to the prejudice of the public, it was agreed in the reign of Henry the firſt, in this kingdom, that the king ſhould have the profits of the land for one year and a day, in lieu of the deſtruction he was otherwiſe at liberty to commit[m]: and therefore *magna carta*[n] provides, that the king ſhall only hold ſuch lands for a year and a day, and then reſtore them to the lord of the fee; without any mention made of waſte. But the ſtatute 17 Edw. II. *de praerogativa regis* ſeems to ſuppoſe, that the king ſhall have his year, day, *and* waſte: and not the year and day *inſtead of* [386] waſte. Which ſir Edward Coke (and the author of the mirror before him) very juſtly look upon as an encroachment, though a very antient one, of the royal prerogative[o]. This year, day, and waſte are now uſually compounded for; but otherwiſe they regularly belong to the crown; and, after their expiration, the land would naturally have deſcended to the heir, (as in gavelkind tenure it ſtill does,) did not it's feodal quality intercept ſuch deſcent, and give it by way of

[i] 2 Inſt. 37.
[k] ch. iii. v. 29.
[l] ch. vi. v. 11.
[m] Mirr. c. 4. § 16. *Flet. l.* 1. *c.* 28.
[n] 9 *Hen. III. c.* 22.
[o] Mirr. c. 5. § 2. 2 Inſt. 37.

eſcheat to the lord. Theſe forfeitures for felony do alſo ariſe only upon attainder: and therefore a *felo de ſe* forfeits no lands of inheritance or freehold, for he never is attainted as a felon [p]. They likewiſe relate back to the time of the offence committed, as well as forfeitures for treaſon; ſo as to avoid all intermediate charges and conveyances. This may be hard upon ſuch as have unwarily engaged with the offender: but the cruelty and reproach muſt lie on the part, not of the law, but of the criminal; who has thus knowingly and diſhoneſtly involved others in his own calamities.

THESE are all the forfeitures of real eſtates, created by the common law, as conſequential upon attainders by judgment of death or outlawry. I here omit the particular forfeitures created by the ſtatutes of *praemunire* and others: becauſe I look upon them rather as a *part* of the judgment and penalty, inflicted by the reſpective ſtatutes, than as *conſequences* of ſuch judgment; as in treaſon and felony they are. But I ſhall juſt mention, as a part of the forfeiture of real eſtates, the forfeiture of the profits of lands during life: which extends to two other inſtances, beſides thoſe already ſpoken of, miſpriſion of treaſon [q], and ſtriking in Weſtminſter-hall, or drawing a weapon upon a judge there, ſitting in the king's courts of juſtice [r].

THE forfeiture of goods and chattels accrues in every one of the higher kinds of offence: in high treaſon or miſpriſion
[387] thereof, petit treaſon, felonies of all ſorts whether clergyable or not, ſelf-murder or felony *de ſe*, petit larciny, ſtanding mute, and the above-mentioned offences of ſtriking, *&c.* in Weſtminſter-hall. For *flight* alſo, on an accuſation of treaſon, felony, or even petit larciny, whether the party be found guilty or acquitted, if the jury find the flight, the party ſhall forfeit his goods and chattels: for the very flight is an offence, carrying with it a ſtrong preſumption of guilt, and is at leaſt an endeavour to elude and ſtifle the courſe of juſtice preſcribed by the law. But the jury very ſeldom find

[p] 3 Inſt. 55. [q] *Ibid.* 218. [r] *Ibid.* 141.

the

the flight[r]: forfeiture being looked upon, ſince the vaſt increaſe of perſonal property of late years, as too large a penalty for an offence, to which a man is prompted by the natural love of liberty.

THERE is a remarkable difference or two between the forfeiture of lands, and of goods and chattels. 1. Lands are forfeited upon *attainder*, and not before: goods and chattels are forfeited by *conviction*. Becauſe in many of the caſes where goods are forfeited, there never is any attainder; which happens only where judgment of death or outlawry is given: therefore in thoſe caſes the forfeiture muſt be upon conviction, or not at all; and, being neceſſarily upon conviction in thoſe, it is ſo ordered in all other caſes, for the law loves uniformity. 2. In outlawries for treaſon or felony, lands are forfeited only by the judgment: but the goods and chattels are forfeited by a man's being firſt put in the *exigent*, without ſtaying till he is *quinto exactus*, or finally outlawed; for the ſecreting himſelf ſo long from juſtice, is conſtrued a flight in law[s]. 3. The forfeiture of lands has relation to the time of the fact committed, ſo as to avoid all ſubſequent ſales and incumbrances: but the forfeiture of goods and chattels has no relation backwards; ſo that thoſe only which a man has at the time of conviction ſhall be forfeited. Therefore a traitor or felon may *bona fide* ſell any of his chattels, real or perſonal, for the ſuſtenance of himſelf and family between the fact and conviction[t]: for perſonal property is of ſo fluctuating a nature, that it paſſes through many hands in [388] a ſhort time; and no buyer could be ſafe, if he were liable to return the goods which he had fairly bought, provided any of the prior vendors had committed a treaſon or felony. Yet if they be colluſively and not *bona fide* parted with, merely to defraud the crown, the law (and particularly the ſtatute 13 Eliz. c. 5.) will reach them; for they are all the while truly and ſubſtantially the goods of the offender: and as he, if acquitted, might recover them himſelf, as not parted with for

[r] Staundf. P. C. 183. b. [s] 3 Inſt. 232. [t] 2 Hawk. P. C. 454.

a good conſideration; ſo in caſe he happens to be convicted, the law will recover them for the king.

II. ANOTHER immediate conſequence of attainder is the *corruption of blood*, both upwards and downwards; ſo that an attainted perſon can neither inherit lands or other hereditaments from his anceſtors, nor retain thoſe he is already in poſſeſſion of, nor tranſmit them by deſcent to any heir; but the ſame ſhall eſcheat to the lord of the fee, ſubject to the king's ſuperior right of forfeiture: and the perſon attainted ſhall alſo obſtruct all deſcents to his poſterity, wherever they are obliged to derive a title through him to a remoter anceſtor [u].

THIS is one of thoſe notions which our laws have adopted from the feodal conſtitutions, at the time of the Norman conqueſt; as appears from it's being unknown in thoſe tenures which are indiſputably Saxon, or gavelkind: wherein, though by treaſon, according to the antient Saxon laws, the land is forfeited to the king, yet no corruption of blood, no impediment of deſcents, enſues; and, on judgment of mere felony, no eſcheat accrues to the lord. And therefore, as every other oppreſſive mark of feodal tenure is now happily worn away in theſe kingdoms, it is to be hoped, that this *corruption of blood*, with all it's connected conſequences, not only of preſent eſcheat, but of future incapacities of inheritance even to the twentieth generation, may in proceſs of time be aboliſhed by act of parliament: as it ſtands upon a very different footing from the forfeiture of lands for high
[389] treaſon, affecting the king's perſon or government. And indeed the legiſlature has, from time to time, appeared very inclinable to give way to ſo equitable a proviſion; by enacting, that, in certain treaſons reſpecting the papal ſupremacy [w] and the public coin [x], and in many of the new-made felonies, created ſince the reign of Henry the eighth by act of

[u] See Vol. II. pag. 251.
[w] Stat. 5 Eliz. c. 1.
[x] Stat. 5 Eliz. c. 11. 18 Eliz. c. 1. & 9 W. III. c. 26. 15 & 16 Geo. II. c. 28.

parliament,

parliament, corruption of blood ſhall be ſaved. But as in ſome of the acts for creating felonies (and thoſe not of the moſt atrocious kind) this ſaving was neglected, or forgotten, to be made, it ſeems to be highly reaſonable and expedient to antiquate the whole of this doctrine by one undiſtinguiſhing law: eſpecially as by the afore-mentioned ſtatute of 7 Ann. c. 21. (the operation of which is poſtponed by ſtatute 17 Geo. II. c. 39.) after the death of the ſons of the late pretender, no attainder for treaſon will extend to the diſinheriting any heir, nor the prejudice of any perſon, other than the offender himſelf; which virtually aboliſhes all corruption of blood for treaſon, though (unleſs the legiſlature ſhould interpoſe) it will ſtill continue for many ſorts of felony (4).

(4) The law of forfeiture in high treaſon is reſtored. See *ante*, p. 385. n. 3.

CHAPTER THE THIRTIETH.

OF REVERSAL OF JUDGMENT.

WE are next to consider how judgments, with their several connected consequences, of attainder, forfeiture, and corruption of blood, may be set aside. There are two ways of doing this; either by falsifying or reversing the judgment, or else by reprieve or pardon.

A JUDGMENT may be falsified, reversed, or avoided, in the first place, *without a writ of error*, for matters foreign to or *dehors* the record, that is, not apparent upon the face of it; so that they cannot be assigned for error in the superior court, which can only judge from what appears in the record itself: and therefore, if the whole record be not certified, or not truly certified, by the inferior court, the party injured thereby (in both civil and criminal cases) may allege a *diminution* of the record, and cause it to be rectified. Thus, if any judgment whatever be given by persons, who had no good commission to proceed against the person condemned, it is void; and may be falsified by shewing the special matter, without writ of error. As, where a commission issues to A and B, and twelve others, or any two of them, of which A or B shall be one, to take and try indictments; and any of the other twelve proceed without the interposition or presence
[391] of either A, or B: in this case all proceedings, trials, convictions, and judgments are void for want of a proper authority in the commissioners, and may be falsified upon bare inspection

inſpection without the trouble of a writ of error[a]; it being a high miſdemeſnor in the judges ſo proceeding, and little (if any thing) ſhort of murder in them all, in caſe the perſon ſo attainted be executed and ſuffer death. So likewiſe if a man purchaſes land of another; and afterwards the vendor is, either by outlawry or his own confeſſion, convicted and attainted of treaſon or felony previous to the ſale or alienation; whereby ſuch land becomes liable to forfeiture or eſcheat: now, upon any trial the purchaſer is at liberty, without bringing any writ of error, to falſify not only the time of the felony or treaſon ſuppoſed, but the very point of the felony or treaſon itſelf; and is not concluded by the confeſſion or the outlawry of the vendor; though the vendor himſelf is concluded, and not ſuffered now to deny the fact, which he has by confeſſion or flight acknowleged. But if ſuch attainder of the vendor was by verdict, on the oath of his peers, the alienee cannot be received to falſify or contradict the *fact* of the crime committed; though he is at liberty to prove a miſtake in *time*, or that the offence was committed after the alienation, and not before[b].

SECONDLY, a judgment may be reverſed, *by writ of error*: which lies from all inferior criminal juriſdictions to the court of king's bench, and from the king's bench to the houſe of peers; and may be brought for notorious miſtakes in the judgment or other parts of the record: as where a man is found guilty of perjury and receives the judgment of felony, or for other leſs palpable errors; ſuch as any irregularity, omiſſion, or want of form in the proceſs of outlawry, or proclamations; the want of a proper *addition* to the defendant's name, according to the ſtatute of additions; for not properly naming the ſheriff or other officer of the court, or not duly deſcribing where his county court was held; for laying an offence, committed in the time of the late king, to be done againſt the peace of the preſent; and for many other ſimilar cauſes, which (though allowed out of tenderneſs to life and [392]

[a] 2 Hawk. P. C. 459. [b] 3 Inſt. 231. 1 Hal. P. C. 361.

liberty)

liberty) are not much to the credit or advancement of the national juſtice. Theſe writs of error, to reverſe judgments in caſe of miſdemeſnors, are not to be allowed of courſe, but on ſufficient probable cauſe ſhewn to the attorney-general; and then they are underſtood to be grantable of common right, and *ex debito juſtitiae*. But writs of error to reverſe attainders in capital caſes are only allowed *ex gratia*; and not without expreſs warrant under the king's ſign manual, or at leaſt by the conſent of the attorney-general [c]. Theſe therefore can rarely be brought by the party himſelf, eſpecially where he is attainted for an offence againſt the ſtate: but they may be brought by his heir, or executor, after his death, in more favourable times; which may be ſome conſolation to his family. But the eaſier, and more effectual way, is,

LASTLY, to reverſe the attainder by act of parliament. This may be and hath been frequently done, upon motives of compaſſion, or perhaps from the zeal of the times, after a ſudden revolution in the government, without examining too cloſely into the truth or validity of the errors aſſigned. And ſometimes, though the crime be univerſally acknowleged and confeſſed, yet the merits of the criminal's family ſhall after his death obtain a reſtitution in blood, honours, and eſtate, or ſome, or one of them, by act of parliament; which (ſo far as it extends) has all the effect of reverſing the attainder, without caſting any reflections upon the juſtice of the preceding ſentence (1).

THE effect of falſifying, or reverſing, an outlawry is that the party ſhall be in the ſame plight as if he had appeared upon the *capias*: and, if it be before plea pleaded, he ſhall be put to plead to the indictment; if after conviction, he

[c] 1 Vern. 170. 175.

(1) This has been lately done with reſpect to the forfeited eſtates in Scotland, by ſtatute 24 Geo. III. c. 57.

ſhall

ſhall receive the ſentence of the law: for all the other proceedings, except only the proceſs of outlawry for his non-appearance, remain good and effectual as before. But when [393] judgment, pronounced upon conviction, is falſified or reverſed, all former proceedings are abſolutely ſet aſide, and the party ſtands as if he had never been at all accuſed; reſtored in his credit, his capacity, his blood, and his eſtates: with regard to which laſt, though they be granted away by the crown, yet the owner may enter upon the grantee, with as little ceremony as he might enter upon a diſſeiſor[d]. But he ſtill remains liable to another proſecution for the ſame offence: for, the firſt being erroneous, he never was in jeopardy thereby.

[d] 2 Hawk. P.C. 462.

CHAPTER THE THIRTY-FIRST.

OF REPRIEVE AND PARDON.

THE only other remaining ways of avoiding the execution of the judgment are by a reprieve, or a pardon; whereof the former is temporary only, the latter permanent.

I. A REPRIEVE, from *reprendre*, to take back, is the withdrawing of a ſentence for an interval of time; whereby the execution is ſuſpended. This may be, firſt, *ex arbitrio judicis*; either before or after judgment: as, where the judge is not ſatisfied with the verdict, or the evidence is ſuſpicious, or the indictment is inſufficient, or he is doubtful whether the offence be within clergy; or ſometimes if it be a ſmall felony, or any favourable circumſtances appear in the criminal's character, in order to give room to apply to the crown for either an abſolute or conditional pardon. Theſe arbitrary reprieves may be granted or taken off by the juſtices of gaol delivery, although their ſeſſion be finiſhed, and their commiſſion expired: but this rather by common uſage, than of ſtrict right[a].

REPRIEVES may alſo be *ex neceſſitate legis*: as, where a woman is capitally convicted, and pleads her pregnancy; though this is no cauſe to ſtay the judgment, yet it is to reſpite the execution till ſhe be delivered. This is a mercy

[a] 2 Hal. P. C. 412.

dictated

dictated by the law of nature, *in favorem prolis*; and therefore no part of the bloody proceedings, in the reign of queen Mary, hath been more justly detested than the cruelty, that was exercised in the island of Guernsey, of burning a woman big with child: and when, through the violence of the flames, the infant sprang forth at the stake, and was preserved by the bystanders, after some deliberation of the priests who assisted at the sacrifice, they cast it again into the fire as a young heretic[b]. A barbarity which they never learned from the laws of *antient* Rome; which direct[c], with the same humanity as our own, "*quod praegnantis mulieris damnatae* "*poena differatur, quoad pariat:*" which doctrine has also prevailed in England, as early as the first memorials of our law will reach[d]. In case this plea be made in stay of execution, the judge must direct a jury of twelve matrons or discreet women to enquire the fact: and if they bring in their verdict *quick with child* (for barely, *with child*, unless it be alive in the womb, is not sufficient) execution shall be staid generally till the next session; and so from session to session, till either she is delivered, or proves by the course of nature not to have been with child at all. But if she once hath had the benefit of this reprieve, and been delivered, and afterwards becomes pregnant again, she shall not be entitled to the benefit of a farther respite for that cause[e]. For she may now be executed before the child is quick in the womb; and shall not, by her own incontinence, evade the sentence of justice (1).

ANOTHER cause of regular reprieve is, if the offender become *non compos*, between the judgment and the award of

[b] Fox, Acts and Mon.
[c] *Ff.* 48. 19. 3.
[d] Flet. *l.* 1. *c.* 38.
[e] 1 Hal. P. C. 369.

(1) As the execution of the law in the first instance is respited not from a regard for the mother, but from tenderness towards the innocent infant; if then it should happen that she becomes quick of a second child, this surely is as much an object of compassion and humanity as the first.

execution[f]: for regularly, as was formerly[g] obſerved, though a man be *compos* when he commits a capital crime, yet if he becomes *non compos* after, he ſhall not be indicted; if after indictment, he ſhall not be convicted; if after conviction, he ſhall not receive judgment; if after judgment, he
[396] ſhall not be ordered for execution: for "*furioſus ſolo furore* "*punitur*," and the law knows not but he might have offered ſome reaſon, if in his ſenſes, to have ſtayed theſe reſpective proceedings. It is therefore an invariable rule, when any time intervenes between the attainder and the award of execution, to demand of the priſoner what he hath to allege, why execution ſhould not be awarded againſt him: and, if he appears to be inſane, the judge in his diſcretion may and ought to reprieve him. Or, the party may *plead* in bar of execution; which plea may be either pregnancy, the king's pardon, an act of grace, or diverſity of perſon, *viz.* that he is not the ſame that was attainted, and the like. In this laſt caſe a jury ſhall be impanelled to try this collateral iſſue, namely, the identity of his perſon; and not whether guilty or innocent; for that has been decided before. And in theſe collateral iſſues the trial ſhall be *inſtanter*[h], and no time allowed the priſoner to make his defence or produce his witneſſes, unleſs he will make oath that he is not the perſon attainted[i]: neither ſhall any peremptory challenges of the jury be allowed the priſoner[j]; though formerly ſuch challenges were held to be allowable, whenever a man's life was in queſtion[k].

II. IF neither pregnancy, inſanity, non-identity, nor other plea will avail to avoid the judgment, and ſtay the execution conſequent thereupon, the laſt and ſureſt reſort is in the king's moſt gracious *pardon*; the granting of which is the moſt amiable prerogative of the crown. Law (ſays an able writer) cannot be framed on principles of compaſſion to

[f] 1 Hal. P. C. 370.
[g] See pag. 24.
[h] 1 Sid. 72. See Appendix, § 3.
[i] Foſt. 42.
[j] 1 Lev. 61. Foſt. 42. 46.
[k] Staundf. P. C. 163. Co. Litt. 157. Hal. Sum. 259.

guilt:

guilt: yet juſtice, by the conſtitution of England, is bound to be adminiſtered in mercy: this is promiſed by the king in his coronation oath, and it is that act of his government which is the moſt perſonal, and moſt entirely his own [l]. The king himſelf condemns no man; that rugged taſk he leaves to his courts of juſtice: the great operation of his ſceptre is mercy. His power of pardoning was ſaid by our Saxon anceſtors [m] to be derived *a lege ſuae dignitatis*: and it is declared in parliament, by ſtatute 27 Hen. VIII. c. 24. that no other perſon hath power to pardon or remit any treaſon or felonies whatſoever; but that the king hath the whole and ſole power thereof, united and knit to the imperial crown of this realm [n]. [397]

THIS is indeed one of the great advantages of monarchy in general, above any other form of government; that there is a magiſtrate, who has it in his power to extend mercy, wherever he thinks it is deſerved: holding a court of equity in his own breaſt, to ſoften the rigour of the general law, in ſuch criminal caſes as merit an exemption from puniſhment. Pardons (according to ſome theoriſts [o]) ſhould be excluded in a perfect legiſlation, where puniſhments are mild but certain: for that the clemency of the prince ſeems a tacit diſapprobation of the laws. But the excluſion of pardons muſt neceſſarily introduce a very dangerous power in the judge or jury, that of conſtruing the criminal law by the ſpirit inſtead of the letter [p]; or elſe it muſt be holden, what no man will ſeriouſly avow, that the ſituation and circumſtances of the offender (though they alter not the eſſence of the crime) ought to make no diſtinction in the puniſhment. In democracies, however, this power of pardon can never ſubſiſt; for there nothing higher is acknowleged than the magiſtrate who adminiſters the laws: and it would be impolitic for the power of judging and of pardoning to center in one and the ſame

[l] Law of forfeit. 99.

[m] *LL. Edw. Conf. c.* 18.

[n] And this power belongs only to a king *de facto*, and not to a king *de jure* during the time of uſurpation. (Bro. Abr. *t. charter de pardon*, 22.)

[o] Beccar. ch. 46.

[p] *Ib'd.* ch. 4.

perſon.

perſon. This (as the preſident Monteſquieu obſerves [q]) would oblige him very often to contradict himſelf, to make and to unmake his deciſions: it would tend to confound all ideas of right among the maſs of the people; as they would find it difficult to tell, whether a priſoner were diſcharged by his innocence, or obtained a pardon through favour. In
[398] Holland therefore, if there be no ſtadtholder, there is no power of pardoning lodged in any other member of the ſtate. But in monarchies the king acts in a ſuperior ſphere; and though he regulates the whole government as the firſt mover, yet he does not appear in any of the diſagreeable or invidious parts of it. Whenever the nation ſee him perſonally engaged, it is only in works of legiſlature, magnificence, or compaſſion. To him therefore the people look up as the fountain of nothing but bounty and grace; and theſe repeated acts of goodneſs, coming immediately from his own hand, endear the ſovereign to his ſubjects, and contribute more than any thing to root in their hearts that filial affection, and perſonal loyalty, which are the ſure eſtabliſhment of a prince.

UNDER this head, of pardons, let us briefly conſider, 1. The *object* of pardon: 2. The *manner* of pardoning: 3. The method of *allowing* a pardon: 4. The *effect* of ſuch pardon, when allowed.

1. AND, firſt, the king may pardon all offences merely againſt the crown, or the public; excepting, 1. That, to preſerve the liberty of the ſubject, the committing any man to priſon out of the realm, is by the *habeas corpus* act, 31 Car. II. c. 2. made a *praemunire*, unpardonable even by the king. Nor, 2. can the king pardon, where private juſtice is principally concerned in the proſecution of offenders: "*non poteſt rex gratiam facere cum injuria et damno aliorum*[r]." Therefore in appeals of all kinds (which are the ſuit, not of the king, but of the party injured) the proſecutor may re-

[q] Sp. L. b. 6. c. 5.

[r] 3 Inſt. 236.

leaſe,

leaſe, but the king cannot pardon [s]. Neither can he pardon a common nuſance, while it remains unredreſſed, or ſo as to prevent an abatement of it; though afterwards he may remit the fine: becauſe though the proſecution is veſted in the king to avoid multiplicity of ſuits, yet (during it's continuance) this offence ſavours more of the nature of a *private* injury to each individual in the neighbourhood, than of a [399] *public* wrong [t]. Neither, laſtly, can the king pardon an offence againſt a popular or penal ſtatute, after information brought: for thereby the informer hath acquired a private property in his part of the penalty [v].

THERE is alſo a reſtriction of a peculiar nature, that affects the prerogative of pardoning, in caſe of parliamentary impeachments; *viz.* that the king's pardon cannot be *pleaded* to any ſuch impeachment, ſo as to impede the inquiry, and ſtop the proſecution of great and notorious offenders. Therefore when, in the reign of Charles the ſecond, the earl of Danby was impeached by the houſe of commons of high treaſon, and other miſdemeſnors, and pleaded the king's pardon in bar of the ſame, the commons alleged [u], "that there "was no precedent, that ever any pardon was granted to any "perſon impeached by the commons of high treaſon, or other "high crimes, *depending the impeachment;*" and thereupon reſolved [w], "that the pardon ſo pleaded was illegal and void, "and ought not to be allowed *in bar* of the impeachment of "the commons of England:" for which reſolution they aſſigned [x] this reaſon to the houſe of lords, "that the ſetting "up a pardon to be a *bar* of an impeachment defeats the "whole uſe and effect of impeachments: for ſhould this "point be admitted, or ſtand doubted, it would totally diſcourage the exhibiting any for the future; whereby the "chief inſtitution for the preſervation of the government "would be deſtroyed." Soon after the revolution, the

[s] 3 Inſt. 237.
[t] 2 Hawk. P. C. 391.
[v] 3 Inſt. 238.
[u] Com. Journ. 28 Apr. 1679.
[w] *Ibid.* 5 May 1679.
[x] *Ibid.* 26 May 1679.

commons renewed the ſame claim, and voted[r], "that a "pardon is not *pleadable in bar* of an impeachment." And, at length, it was enacted by the act of ſettlement, 12 & 13 W. III. c. 2. "that no pardon under the great ſeal of Eng- "land ſhall be *pleadable* to an impeachment by the commons "in parliament." But, after the impeachment has been ſolemnly heard and determined, it is not underſtood that the
[400] king's royal grace is farther reſtrained or abridged: for, after the impeachment and attainder of the ſix rebel lords in 1715, three of them were from time to time reprieved by the crown, and at length received the benefit of the king's moſt gracious pardon (2).

[r] Com. Journ. 6 June 1689.

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(2) The following remarkable record, in which it is both acknowledged by the commons and aſſerted by the king, proves that the king's prerogative to pardon delinquents convicted in impeachments, is as ancient as the conſtitution itſelf.

Item prie la commune a noſtre dit ſeigneur le roi que nul pardon ſoit grante a nully perſone, petit ne grande, q'ont eſte de ſon counſeil et ſerementez, et ſont empeſchez en ceſt preſent parlement de vie ne de membre, fyn ne de raunceon, de forfaiture des terres, tenemenz, biens, ou chateux, leſqueux ſont ou ſerront trovez en aucun defaut encontre leur ligeance, et la tenure de leur dit ſerement; mais q'ils ne ſerront jammes conſeillers ne officers du roi, mais en tout ouſtez de la courte le roi et de conſeil as touz jours. Et ſur ceo ſoit en preſent parlement fait eſtatut s'il pleſt au roi, et de touz autres en temps a venir en cas ſemblables, pur profit du roi et de roialme.

Reſponſio.—Le roi ent fra ſa volente, come mielx lui ſemblera. Rot. Parl. 50 Ed. III. n. 188.

After the lords have delivered their ſentence of guilty, the commons have the power of pardoning the impeached convict, by refuſing to demand judgment againſt him, for no judgment can be pronounced by the lords till it is demanded by the commons. Lord Macclesfield was found guilty without a diſſenting voice in the houſe of lords; but when the queſtion was afterwards propoſed in the houſe of commons, *that this houſe will demand judgment of the lords againſt Thomas earl of Macclesfield*, it occaſioned a warm debate, but (the previous queſtion being firſt moved) it was carried

2. As to the *manner* of pardoning. 1. First, it muſt be under the *great* ſeal. A warrant under the privy ſeal, or ſign manual, though it may be a ſufficient authority to admit the party to bail, in order to plead the king's pardon, when obtained in proper form, yet is not of itſelf a complete irrevocable pardon[z]. 2. Next, it is a general rule, that, wherever it may reaſonably be preſumed the king is deceived, the pardon is void[a]. Therefore any ſuppreſſion of truth, or ſuggeſtion of falſehood, in a charter of pardon, will vitiate the whole; for the king was miſinformed[b]. 3. General words have alſo a very imperfect effect in pardons. A pardon of all felonies will not pardon a conviction or attainder of felony; (for it is preſumed the king knew not of thoſe proceedings;) but the conviction or attainder muſt be particularly mentioned[c]; and a pardon of felonies will not include piracy[d]; for that is no felony puniſhable at the common law. 4. It is alſo enacted by ſtatute 13 Ric. II. ſt. 2. c. 1. that no pardon for treaſon, murder, or rape ſhall be allowed, unleſs the offence be particularly ſpecified therein; and particularly in murder it ſhall be expreſſed, whether it was committed by lying in wait, aſſault, or malice prepenſe. Upon which ſir Edward Coke obſerves[e], that it was not the intention of the parliament that the king ſhould ever pardon murder under theſe aggravations; and therefore they prudently laid the pardon under theſe reſtrictions, becauſe they did not conceive it poſſible that the king would ever excuſe an offence by name, which was attended with ſuch high aggravations.

[z] 5 St. Tr. 166. 173.
[a] 2 Hawk. P. C. 383.
[b] 3 Inſt. 238.
[c] 2 Hawk. P. C. 383.
[d] 1 Hawk. P. C. 99.
[e] 3 Inſt. 236.

carried in the affirmative by a majority of 136 voices againſt 65. *Comm. Journ.* 27 May 1725. 6 *H. St. Tr.* 762. In the impeachment of Warren Haſtings, eſq. it was decided, after much ſerious and learned inveſtigation and diſcuſſion, by a very great majority in each houſe of parliament, that an impeachment was not abated by a diſſolution of the parliament, though almoſt all the legal characters of each houſe voted in the minorities.

And it is remarkable enough, that there is no precedent of a pardon in the regiſter for any other homicide, than that
[401] which happens *ſe defendendo* or *per infortunium*: to which two ſpecies the king's pardon was expreſsly confined by the ſtatutes 2 Edw. III. c. 2. and 14 Edw. III. c. 15. which declare that no pardon of homicide ſhall be granted, but only where the king may do it *by the oath of his crown*; that is to ſay, where a man ſlayeth another in his own defence, or by misfortune. But the ſtatute of Richard the ſecond, before-mentioned, enlarges by implication the royal power: provided the king is not deceived in the intended object of his mercy. And therefore pardons of murder were always granted with a *non obſtante* of the ſtatute of king Richard, till the time of the revolution; when the doctrine of *non obſtante*'s ceaſing, it was doubted whether murder could be pardoned generally: but it was determined by the court of king's bench[f], that the king may pardon on an indictment of murder, as well as a ſubject may diſcharge an appeal. Under theſe and a few other reſtrictions, it is a general rule, that a pardon ſhall be taken moſt beneficially *for* the ſubject, and moſt ſtrongly againſt the king.

A PARDON may alſo be *conditional*: that is, the king may extend his mercy upon what terms he pleaſes; and may annex to his bounty a condition either precedent or ſubſequent, on the performance whereof the validity of the pardon will depend: and this by the common law[g]. Which prerogative is daily exerted in the pardon of felons, on condition of being confined to hard labour for a ſtated time, or of tranſportation to ſome foreign country for life, or for a term of years; ſuch tranſportation or baniſhment[h] being allowable and warranted by the *habeas corpus* act, 31 Car. II. c. 2. § 14. and both the impriſonment and tranſportation rendered more eaſy and

[f] Salk. 499.
[g] 2 Hawk. P. C. 394.
[h] Tranſportation is ſaid (Bar. 352.) to have been firſt inflicted as a puniſhment, by ſtatute 39 Eliz. c. 4.

effectual

effectual by ſtatutes 8 Geo. III. c. 15. and 19 Geo. III. c. 74 (3).

3. With regard to the manner of *allowing* pardons; we may obſerve, that a pardon by act of parliament is more beneficial than by the king's charter; for a man is not bound [402] to plead it, but the court muſt *ex officio* take notice of it[i]; neither can he loſe the benefit of it by his own *laches* or negligence, as he may of the king's charter of pardon[k]. The king's charter of pardon muſt be ſpecially pleaded, and that at a proper time: for if a man is indicted, and has a pardon in his pocket, and afterwards puts himſelf upon his trial by pleading the general iſſue, he has waived the benefit of ſuch pardon[l]. But, if a man avails himſelf thereof as ſoon as by courſe of law he may, a pardon may either be pleaded upon arraignment, or in arreſt of judgment, or in the preſent ſtage of proceedings, in bar of execution. Antiently, by ſtatute 10 Edw. III. c. 2. no pardon of felony could be allowed, unleſs the party found ſureties for the good behaviour before the ſheriff and coroners of the county[m]. But that ſtatute is repealed by the ſtatute 5 & 6 W. & M. c. 13. which, inſtead thereof, gives the judges of the court a diſcretionary power to bind the criminal, pleading ſuch pardon, to his good behaviour, with two ſureties, for any term not exceeding ſeven years.

4. Lastly, the *effect* of ſuch pardon by the king, is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not ſo much to reſtore his former, as to give him a new, credit and capacity. But nothing can

[i] Foſt. 43.
[k] 2 Hawk. P. C. 397.
[l] *Ibid.* 396.
[m] Salk. 499.

(3) And ſtill farther by 24 Geo. III. c. 56. and 31 Geo. III. c. 46.

reſtore or purify the blood when once corrupted, if the pardon be not allowed till after attainder, but the high and tranſcendent power of parliament. Yet if a perſon attainted receives the king's pardon, and afterwards hath a ſon, that ſon may be heir to his father, becauſe the father being made a new man, might tranſmit new inheritable blood; though, had he been born before the pardon, he could never have inherited at all [a] (4).

[a] See Vol. II. pag. 254.

(4) A ſon born after the attainder may inherit if he has no elder brother living born before the attainder, otherwiſe the land will eſcheat *pro defectu haeredis*. 1 *H. P. C.* 358.

CHAPTER THE THIRTY-SECOND.

OF EXECUTION.

THERE now remains nothing to ſpeak of, but *execution*; the completion of human puniſhment. And this, in all caſes, as well capital as otherwiſe, muſt be performed by the legal officer, the ſheriff or his deputy; whoſe warrant for ſo doing was antiently by precept under the hand and ſeal of the judge, as it is ſtill practiſed in the court of the lord high ſteward, upon the execution of a peer[a]: though, in the court of the peers in parliament, it is done by writ from the king[b]. Afterwards it was eſtabliſhed[c], that, in caſe of life, the judge may command execution to be done without any writ. And now the uſage is, for the judge to ſign the calendar, or liſt of all the priſoners' names, with their ſeparate judgments in the margin, which is left with the ſheriff. As, for a capital felony, it is written oppoſite to the priſoner's name "let him be hanged by the neck;" formerly, in the days of Latin and abbreviation[d], "*ſuſ. per col.*" for "*ſuſpendatur per collum.*" And this is the only warrant that the ſheriff has for ſo material an act as taking away the life of another[e]. It may certainly afford matter of ſpeculation, that in civil cauſes there ſhould be ſuch a variety of writs of execution to recover a trifling debt, iſſued in the king's name, and under the ſeal of the court, without which the ſheriff cannot legally ſtir one ſtep; and yet that the execution of a [404]

[a] 2 Hal. P. C. 409.
[b] See Append. § 5.
[c] Finch. L. 478.
[d] Staundf. P. C. 182.
[e] 5 Mod. 22.

man, the moſt important and terrible talk of any, ſhould depend upon a marginal note (1).

The ſheriff, upon receipt of his warrant, is to do execution within a convenient time; which in the country is alſo left at large. In London indeed a more ſolemn and becoming exactneſs is uſed, both as to the warrant of execution, and the time of executing thereof: for the recorder, after reporting to the king in perſon the caſe of the ſeveral priſoners, and receiving his royal pleaſure, that the law muſt take it's courſe, iſſues his warrant to the ſheriffs; directing them to do execution on the day and at the place aſſigned [f]. And, in the court of king's bench, if the priſoner be tried at the bar, or brought there by *habeas corpus*, a rule is made for his execution; either ſpecifying the time and place [g], or leaving it to the diſcretion of the ſheriff [h]. And, throughout

[f] See Append. § 4.
[g] St. Trials, VI. 332. Fol. 43.
[h] See Append. § 3.

(1) Though it be true that a marginal note of a calendar, ſigned by the judge, is the only warrant that the ſheriff has for the execution of a convict, yet it is made with more caution and ſolemnity than is repreſented by the learned commentator. At the end of the aſſizes the clerk of aſſize makes out in writing four liſts of all the priſoners, with ſeparate columns, containing their crimes, verdicts, and ſentences, leaving a blank column, in which, if the judge has reaſon to vary the courſe of the law, he writes oppoſite the names of the capital convicts, *to be reprieved, reſpited, tranſported*, &c. Theſe four calendars, being firſt carefully compared together by the judge and the clerk of aſſize, are ſigned by them, and one is given to the ſheriff, one to the gaoler, and the judge and the clerk of aſſize each keep another. If the ſheriff receives afterwards no ſpecial order from the judge, he executes the judgment of the law in the uſual manner, agreeably to the directions of his calendar. In every county this important ſubject is ſettled with great deliberation by the judge and the clerk of aſſize, before the judge leaves the aſſize-town; but probably in different counties, with ſome ſlight variation, as in Lancaſhire, no calendar is left with the gaoler, but one is ſent to the ſecretary of ſtate.

the

the kingdom, by ſtatute 25 Geo. II. c. 37. it is enacted that, in caſe of murder, the judge ſhall in his ſentence direct execution to be performed on the next day but one after ſentence paſſed [i]. But, otherwiſe, the time and place of execution are by law no part of the judgment [k]. It has been well obſerved [l], that it is of great importance, that the puniſhment ſhould follow the crime as early as poſſible; that the proſpect of gratification or advantage, which tempts a man to commit the crime, ſhould inſtantly awake the attendant idea of puniſhment. Delay of execution ſerves only to ſeparate theſe ideas: and then the execution itſelf affects the minds of the ſpectators rather as a terrible ſight, than as the neceſſary conſequence of tranſgreſſion.

THE ſheriff cannot alter the manner of the execution by ſubſtituting one death for another, without being guilty of felony himſelf, as has been formerly ſaid [m]. It is held alſo by ſir Edward Coke [n] and ſir Matthew Hale [o], that even the [405] king cannot change the puniſhment of the law, by altering the hanging or burning into beheading; though, when beheading is part of the ſentence, the king may remit the reſt. And, notwithſtanding ſome examples to the contrary, ſir Edward Coke ſtoutly maintains, that "*judicandum eſt legibus, non exemplis.*" But others have thought [p], and more juſtly, that this prerogative, being founded in mercy and immemorially exerciſed by the crown, is part of the common law. For hitherto, in every inſtance, all theſe exchanges have been for more merciful kinds of death; and how far this may alſo fall within the king's power of granting conditional pardons, (*viz.* by remitting a ſevere kind of death, on condition that the criminal ſubmits to a milder,) is a matter that may bear conſideration. It is obſervable, that when lord Stafford was executed for the popiſh plot in the reign of

[i] See pag. 202.
[k] So held by the twelve judges, Mich. 10 Geo. III.
[l] Beccar. ch. 19.
[m] See pag. 179.
[n] 3 Inſt. 52.
[o] 2 Hal. P. C. 412.
[p] Foſt. 270. F. N. B. 244. h. 19 Rym. *Fœd.* 284.

king

king Charles the ſecond, the then ſheriffs of London, having received the king's writ for beheading him, petitioned the houſe of lords, for a command or order from their lordſhips, how the ſaid judgment ſhould be executed: for, he being proſecuted by impeachment, they entertained a notion (which is ſaid to have been countenanced by lord Ruſſel) that the king could not pardon any part of the ſentence[q]. The lords reſolved[r], that the ſcruples of the ſheriffs were unneceſſary, and declared, that the king's writ ought to be obeyed. Diſappointed of raiſing a flame in that aſſembly, they immediately ſignified[s] to the houſe of commons by one of the members, that they were not ſatisfied as to the power of the ſaid writ. That houſe took two days to conſider of it; and then ſullenly[t] reſolved, that the houſe was *content* that the ſheriff do execute lord Stafford by ſevering his head from his body. It is further related, that when afterwards the ſame lord Ruſſel was condemned for high treaſon upon indictment, the king while he remitted the ignominious part of
[406] the ſentence, obſerved, "that his lordſhip would now find "he was poſſeſſed of that prerogative, which in the caſe of "lord Stafford he had denied him[u]." One can hardly determine (at this diſtance from thoſe turbulent times) which moſt to diſapprove of, the indecent and ſanguinary zeal of the ſubject, or the cool and cruel ſarcaſm of the ſovereign.

To conclude: it is clear, that if, upon judgment to be hanged by the neck till he is dead, the criminal be not thoroughly killed, but revives, the ſheriff muſt hang him again[w]. For the former hanging was no execution of the ſentence; and, if a falſe tenderneſs were to be indulged in ſuch caſes, a multitude of colluſions might enſue. Nay, even while abjurations were in force[x], ſuch a criminal, ſo reviving, was not allowed to take ſanctuary and abjure the realm; but his fleeing to ſanctuary was held an eſcape in the officer[y]:

[q] 2 Hum. Hiſt. of G. B. 328.
[r] Lords Journ. 21 Dec. 1680.
[s] Com. Journ. 21 Dec. 1680.
[t] *Ibid.* 23 Dec. 1680.
[u] 2 Hume. 360.
[w] 2 Hal. P. C. 412. 2 Hawk. P. C. 463.
[x] See pag. 326.
[y] Fitzh. *Abr. t. coron.* 335. Finch. L. 467.

AND

AND having thus arrived at the *laſt* ſtage of criminal proceedings, or execution, the end and completion of human *puniſhment*, which was the ſixth and laſt head to be conſidered under the diviſion of *public wrongs*, the fourth and laſt object of the laws of England; it may now ſeem high time to put a period to theſe commentaries, which the author is very ſenſible, have already ſwelled to too great a length. But he cannot diſmiſs the ſtudent, for whoſe uſe alone theſe rudiments were originally compiled, without endeavouring to recall to his memory ſome principal outlines of the legal conſtitution of this country; by a ſhort hiſtorical review of the moſt conſiderable revolutions, that have happened in the laws of England, from the earlieſt to the preſent times. And this taſk he will attempt to diſcharge, however imperfectly, in the next or concluding chapter.

CHAPTER THE THIRTY-THIRD.

OF THE RISE, PROGRESS, AND GRADUAL IMPROVEMENTS, OF THE LAWS OF ENGLAND.

BEFORE we enter on the ſubject of this chapter, in which I propoſe, by way of ſupplement to the whole, to attempt an hiſtorical review of the moſt remarkable changes and alterations, that have happened in the laws of England, I muſt firſt of all remind the ſtudent, that the riſe and progreſs of many principal points and doctrines have been already pointed out in the courſe of theſe commentaries, under their reſpective diviſions: theſe having therefore been particularly diſcuſſed already, it cannot be expected that I ſhould re-examine them with any degree of minuteneſs; which would be a moſt tedious undertaking. What I therefore at preſent propoſe, is only to mark out ſome outlines of an Engliſh juridical hiſtory, by taking a chronological view of the ſtate of our laws, and their ſucceſſive mutations at different periods of time.

THE ſeveral periods, under which I ſhall conſider the ſtate of our legal polity, are the following ſix: 1. From the earlieſt times to the Norman conqueſt: 2. From the Norman conqueſt to the reign of king Edward the firſt: 3. From thence to the reformation: 4. From the reformation to the reſtoration of king Charles the ſecond: 5. From thence to
[408] the revolution in 1688: 6. From the revolution to the preſent time.

I. AND,

I. AND, firſt, with regard to the antient Britons, the *aborigines* of our iſland, we have ſo little handed down to us concerning them with any tolerable certainty, that our inquiries here muſt needs be very fruitleſs and defective. However, from Cæſar's account of the tenets and diſcipline of the antient Druids in Gaul, in whom centered all the learning of theſe weſtern parts, and who were, as he tells us, ſent over to Britain, (that is, to the iſland of Mona or Angleſey,) to be inſtructed; we may collect a few points, which bear a great affinity and reſemblance to ſome of the modern doctrines of our Engliſh law. Particularly, the very notion itſelf of an oral unwritten law, delivered down from age to age, by cuſtom and tradition merely, ſeems derived from the practice of the Druids, who never committed any of their inſtructions to writing: poſſibly for want of letters; ſince it is remarkable that in all the antiquities, unqueſtionably Britiſh, which the induſtry of the moderns has diſcovered, there is not in any of them the leaſt trace of any character or letter to be found. The partible quality alſo of lands, by the cuſtom of gavelkind, which ſtill obtains in many parts of England, and did univerſally over Wales till the reign of Henry VIII, is undoubtedly of Britiſh original. So likewiſe is the antient diviſion of the goods of an inteſtate between his widow and children, or next of kin; which has ſince been revived by the ſtatute of diſtributions. And we may alſo remember an inſtance of a ſlighter nature mentioned in the preſent volume, where the ſame cuſtom has continued from Cæſar's time to the preſent; that of burning a woman guilty of the crime of petit treaſon by killing her huſband (1).

THE great variety of nations, that ſucceſſively broke in upon and deſtroyed both the Britiſh inhabitants and conſtitution, the Romans, the Picts, and, after them, the various [409]

(1) But this is now altered by ſtatute 30 Geo. III. c. 48. See ante, p. 204.

clans of Saxons and Danes, muſt neceſſarily have cauſed great confuſion and uncertainty in the laws and antiquities of the kingdom; as they were very ſoon incorporated and blended together, and therefore, we may ſuppoſe, mutually communicated to each other their reſpective uſages[a], in regard to the rights of property, and the puniſhment of crimes. So that it is morally impoſſible to trace out, with any degree of accuracy, *when* the ſeveral mutations of the common law were made, or what was the reſpective original of thoſe ſeveral cuſtoms we at preſent uſe, by any chemical reſolution of them to their firſt and component principles. We can ſeldom pronounce, that *this* cuſtom was derived from the Britons; *that* was left behind by the Romans; *this* was a neceſſary precaution againſt the Picts; *that* was introduced by the Saxons, diſcontinued by the Danes, but afterwards reſtored by the Normans.

WHEREVER this can be done, it is matter of great curioſity, and ſome uſe: but this can very rarely be the caſe; not only from the reaſon above-mentioned, but alſo from many others. Firſt, from the nature of traditional laws in general; which, being accommodated to the exigencies of the times, ſuffer by degrees inſenſible variations in practice[b]: ſo that, though upon compariſon we plainly diſcern the alteration of the law from what it was five hundred years ago, yet it is impoſſible to define the preciſe period in which that alteration accrued, any more than we can diſcern the changes of the bed of a river, which varies it's ſhores by continual decreaſes and alluvions. Secondly, this becomes impracticable from the antiquity of the kingdom and it's government: which alone, though it had been diſturbed by no foreign invaſions, would make it impoſſible to ſearch out the original of it's laws; unleſs we had as authentic monuments thereof, as the Jews had by the hand of Moſes[c]. Thirdly,
[410] this uncertainty of the true origin of particular cuſtoms muſt

[a] Hal. Hiſt. C. L. 62. [b] *Ibid.* 57. [c] *Ibid.* 59.

alſo in part have ariſen from the means, whereby chriſtianity was propagated among our Saxon anceſtors in this iſland; by learned foreigners brought over from Rome and other countries; who undoubtedly carried with them many of their own national cuſtoms; and probably prevailed upon the ſtate to abrogate ſuch uſages as were inconſiſtent with our holy religion, and to introduce many others that were more conformable thereto. And this perhaps may have partly been the cauſe, that we find not only ſome rules of the moſaical, but alſo of the imperial and pontifical laws, blended and adopted into our own ſyſtem.

A FARTHER reaſon may alſo be given for the great variety, and of courſe the uncertain original, of our antient eſtabliſhed cuſtoms; even after the Saxon government was firmly eſtabliſhed in this iſland: *viz.* the ſubdiviſion of the kingdom into an heptarchy, conſiſting of ſeven independent kingdoms, peopled and governed by different clans and colonies. This muſt neceſſarily create an infinite diverſity of laws: even though all thoſe colonies, of Jutes, Angles, Anglo-Saxons, and the like, originally ſprung from the ſame mother-country, the great northern hive; which poured forth it's warlike progeny, and ſwarmed all over Europe, in the ſixth and ſeventh centuries. This multiplicity of laws will neceſſarily be the caſe in ſome degree, where any kingdom is cantoned out into provincial eſtabliſhments; and not under one common diſpenſation of laws, though under the ſame ſovereign power. Much more will it happen where ſeven unconnected ſtates are to form their own conſtitution and ſuperſtructure of government, though they all begin to build upon the ſame or ſimilar foundations.

WHEN therefore the Weſt Saxons had ſwallowed up all the reſt, and king Alfred ſucceeded to the monarchy of England, whereof his grandfather Egbert was the founder, his mighty genius prompted him to undertake a moſt great and neceſſary work, which he is ſaid to have executed in as maſterly a manner: no leſs than to new model the conſtitution; [411] to

to rebuild it on a plan that ſhould endure for ages; and, out of it's old diſcordant materials, which were heaped upon each other in a vaſt and rude irregularity, to form one uniform and well-connected whole. This he effected, by reducing the whole kingdom under one regular and gradual ſubordination of government, wherein each man was anſwerable to his immediate ſuperior for his own conduct and that of his neareſt neighbours: for to him we owe that maſterpiece of judicial polity, the ſubdiviſion of England into tithings and hundreds, if not into counties; all under the influence and adminiſtration of one ſupreme magiſtrate, the king; in whom as in a general reſervoir, all the executive authority of the law was lodged, and from whom juſtice was diſperſed to every part of the nation by diſtinct, yet communicating, ducts and channels; which wiſe inſtitution has been preſerved for near a thouſand years unchanged, from Alfred's to the preſent time. He alſo, like another Theodoſius, collected the various cuſtoms that he found diſperſed in the kingdom, and reduced and digeſted them into one uniform ſyſtem or code of laws, in his bom bec, or *liber judicialis*. This he compiled for the uſe of the court-baron, hundred, and county-court, the court-leet, and ſheriff's tourn; tribunals, which he eſtabliſhed, for the trial of all cauſes civil and criminal, in the very diſtricts wherein the complaint aroſe: all of them ſubject however to be inſpected, controlled, and kept within the bounds of the univerſal or common law, by the king's own courts; which were then itinerant, being kept in the king's palace, and removing with his houſhold in thoſe royal progreſſes, which he continually made from one end of the kingdom to the other.

THE Daniſh invaſion and conqueſt, which introduced new foreign cuſtoms, was a ſevere blow to this noble fabric: but a plan, ſo excellently concerted, could never be long thrown aſide. So that, upon the expulſion of theſe intruders, the Engliſh returned to their antient law; retaining however ſome few of the cuſtoms of their late viſitants; which went under the name of *Dane-Lage*: as the code compiled by

Alfred

Alfred was called the *Weſt-Saxon-Lage*; and the local conſtitutions of the antient kingdom of Mercia, which obtained in the counties neareſt to Wales, and probably abounded with many Britiſh cuſtoms, were called the *Mercen-Lage*. And theſe three laws were, about the beginning of the eleventh century, in uſe in different counties of the realm: the provincial polity of counties, and their ſubdiviſions, having never been altered or diſcontinued through all the ſhocks and mutations of government, from the time of it's firſt inſtitution; though the laws and cuſtoms therein uſed, have (as we ſhall ſee) often ſuffered conſiderable changes.

For king Edgar, (who beſides his military merit, as founder of the Engliſh navy, was alſo a moſt excellent civil governor,) obſerving the ill effects of three diſtinct bodies of laws, prevailing at once in ſeparate parts of his dominions, projected and begun what his grandſon king Edward the confeſſor afterwards completed; *viz.* one uniform digeſt or body of laws to be obſerved throughout the whole kingdom: being probably no more than a revival of king Alfred's code, with ſome improvements ſuggeſted by neceſſity and experience; particularly the incorporating ſome of the Britiſh or rather Mercian cuſtoms, and alſo ſuch of the Daniſh as were reaſonable and approved, into the *Weſt-Saxon-Lage*, which was ſtill the groundwork of the whole. And this appears to be the beſt ſupported and moſt plauſible conjecture (for certainty is not to be expected) of the riſe and original of that admirable ſyſtem of maxims and unwritten cuſtoms, which is now known by the name of the *common* law, as extending it's authority univerſally over all the realm; and which is doubtleſs of Saxon parentage.

Among the moſt remarkable of the Saxon laws we may reckon, 1. The conſtitution of parliaments, or rather, general aſſemblies of the principal and wiſeſt men in the nation: the *witten-gemote*, or *commune conſilium* of the antient Germans; which was not yet reduced to the forms and diſtinctions of our modern parliament: without whoſe concurrence, however,

however, no new law could be made, or old one altered. 2. The election of their magiſtrates by the people; originally even that of their kings, till dear-bought experience evinced the convenience and neceſſity of eſtabliſhing an hereditary ſucceſſion to the crown. But that of all ſubordinate magiſtrates, their military officers or heretochs, their ſheriffs, their conſervators of their peace, their coroners, their port-reeves, (ſince changed into mayors and bailiffs,) and even their tythingmen and borſholders at the leet, continued, ſome till the Norman conqueſt, others for two centuries after, and ſome remain to this day. 3. The deſcent of the crown, when once a royal family was eſtabliſhed, upon nearly the ſame hereditary principles upon which it has ever ſince continued: only that perhaps, in caſe of minority, the next of kin of full age would aſcend the throne, as king, and not as protector; though, after his death, the crown immediately reverted back to the heir. 4. The great paucity of capital puniſhments for the firſt offence: even the moſt notorious offenders being allowed to commute it for a fine or *weregild*, or, in default of payment, perpetual bondage; to which our benefit of clergy has now in ſome meaſure ſucceeded. 5. The prevalence of certain cuſtoms, as heriots and military ſervices in proportion to every man's land, which much reſembled the feodal conſtitution; but yet were exempt from all it's rigorous hardſhips: and which may be well enough accounted for, by ſuppoſing them to be brought from the continent by the firſt Saxon invaders, in the primitive moderation and ſimplicity of the feodal law; before it got into the hands of the Norman juriſts, who extracted the moſt ſlaviſh doctrines and oppreſſive conſequences out of what was originally intended as a law of liberty. 6. That their eſtates were liable to forfeiture for treaſon, but that the doctrine of eſcheats and corruption of blood for felony, or any other cauſe, was utterly unknown amongſt them. 7. The deſcent of their lands to all the males equally, without any right of primogeniture; a cuſtom, which obtained among the Britons, was agreeable to the Roman law, and continued among the Saxons till the Norman

[-414] conqueſt: though really inconvenient, and more eſpecially

deſtructive

deſtructive to antient families; which are in monarchies neceſſary to be ſupported, in order to form and keep up a nobility, or intermediate ſtate between the prince and the common people. 8. The courts of juſtice conſiſted principally of the county courts, and in caſes of weight or nicety the king's court held before himſelf in perſon, at the time of his parliaments; which were uſually holden in different places, according as he kept the three great feſtivals of chriſtmas, eaſter, and whitſuntide. An inſtitution which was adopted by king Alonſo VII. of Caſtile, about a century after the conqueſt: who at the ſame three great feaſts was wont to aſſemble his nobility and prelates in his court; who there heard and decided all controverſies, and then, having received his inſtructions, departed home[d]. Theſe county courts however differed from the modern ones, in that the eccleſiaſtical and civil juriſdiction were blended together, the biſhop and the ealdorman or ſheriff ſitting in the ſame county court; and alſo that the deciſions and proceedings therein were much more ſimple and unembarraſſed: an advantage which will always attend the infancy of any laws, but wear off as they gradually advance to antiquity. 9. Trials, among a people who had a very ſtrong tincture of ſuperſtition, were permitted to be by *ordeal*, by the *corſned* or morſel of execration, or by *wager of law* with compurgators, if the party choſe it; but frequently they were alſo by *jury*: for, whether or no their juries conſiſted preciſely of twelve men, or were bound to a ſtrict unanimity; yet the general conſtitution of this admirable criterion of truth, and moſt important guardian both of public and private liberty, we owe to our Saxon anceſtors. Thus ſtood the general frame of our polity at the time of the Norman invaſion; when the ſecond period of our legal hiſtory commences.

II. THIS remarkable event wrought as great an alteration in our laws, as it did in our antient line of kings: and though the alteration of the former was effected rather by the

[d] Mod. Un. Hiſt. xx. 114.

conſent of the people, than any right of conqueſt, yet that conſent ſeems to have been partly extorted by fear, and partly given without any apprehenſion of the conſequences which afterwards enſued.

1, AMONG the firſt of theſe alterations we may reckon the ſeparation of the eccleſiaſtical courts from the civil: effected in order to ingratiate the new king with the popiſh clergy, who for ſome time before had been endeavouring all over Europe to exempt themſelves from the ſecular power; and whoſe demands the conqueror, like a politic prince, thought it prudent to comply with, by reaſon that their reputed ſanctity had a great influence over the minds of the people; and becauſe all the little learning of the times was engroſſed into their hands, which made them neceſſary men, and by all means to be gained over to his intereſts. And this was the more eaſily effected, becauſe, the diſpoſal of all the epiſcopal ſees being then in the breaſt of the king, he had taken care to fill them with Italian and Norman prelates.

2. ANOTHER violent alteration of the Engliſh conſtitution conſiſted in the depopulation of whole countries, for the purpoſes of the king's royal diverſion; and ſubjecting both them, and all the antient foreſts of the kingdom, to the unreaſonable ſeverities of foreſt laws imported from the continent, whereby the ſlaughter of a beaſt was made almoſt as penal as the death of a man. In the Saxon times, though no man was allowed to kill or chaſe the king's deer, yet he might ſtart any game, purſue, and kill it, upon his own eſtate. But the rigour of theſe new conſtitutions veſted the ſole property of all the game in England in the king alone (2); and no man was entitled to diſturb any fowl of the air, or any beaſt of the field, of ſuch kinds as were ſpecially reſerved for the royal amuſement of the ſovereign, without expreſs licence from the king,

(2) See this controverted by the editor in the 2d vol. p. 419. n. 10.

by

by a grant of a chaſe or free-warren: and thoſe franchiſes were granted as much with a view to preſerve the breed of animals, as to indulge the ſubject. From a ſimilar principle to which, though the foreſt laws are now mitigated, and by degrees grown entirely obſolete, yet from this root has ſprung a baſ- [416]
tard ſlip, known by the name of the game law, now arrived to and wantoning in it's higheſt vigour: both founded upon the ſame unreaſonable notions of permanent property in wild creatures; and both productive of the ſame tyranny to the commons: but with this difference; that the foreſt laws eſtabliſhed only one mighty hunter throughout the land, the game laws have raiſed a little Nimrod in every manor. And in one reſpect the antient law was much leſs unreaſonable than the modern: for the king's grantee of a chaſe or free-warren might kill game in every part of his franchiſe; but now, though a freeholder of leſs than 100 *l.* a year is forbidden to kill a partridge upon his own eſtate, yet nobody elſe (not even the lord of the manor, unleſs he hath a grant of free-warren) can do it without committing a treſpaſs, and ſubjecting himſelf to an action.

3. A THIRD alteration in the Engliſh laws was by narrowing the remedial influence of the county courts, the great ſeats of Saxon juſtice, and extending the *original* juriſdiction of the king's juſticiars to all kinds of cauſes, ariſing in all parts of the kingdom. To this end the *aula regis*, with all it's multifarious authority, was erected; and a capital juſticiary appointed, with powers ſo large and boundleſs, that he became at length a tyrant to the people, and formidable to the crown itſelf. The conſtitution of this court, and the judges themſelves who preſided there, were fetched from the duchy of Normandy: and the conſequence naturally was, the ordaining that all proceedings in the king's courts ſhould be carried on in the Norman, inſtead of the Engliſh language. A proviſion the more neceſſary, becauſe none of his Norman juſticiars underſtood Engliſh; but as evident a badge of ſlavery as ever was impoſed upon a conquered people. This laſted till king Edward the third obtained a double victory,

over the armies of France in their own country, and their language in our courts here at home. But there was one miſchief too deeply rooted thereby, and which this caution of
[417] king Edward came too late to eradicate. Inſtead of the plain and eaſy method of determining ſuits in the county courts, the chicanes and ſubtleties of Norman juriſprudence had taken poſſeſſion of the king's courts, to which every cauſe of conſequence was drawn. Indeed that age, and thoſe immediately ſucceeding it, were the æra of refinement and ſubtilty. There is an active principle in the human ſoul, that will ever be exerting it's faculties to the utmoſt ſtretch, in whatever employment, by the accidents of time and place, the general plan of education, or the cuſtoms and manners of the age and country, it may happen to find itſelf engaged. The northern conquerors of Europe were then emerging from the groſſeſt ignorance in point of literature; and thoſe, who had leiſure to cultivate it's progreſs, were ſuch only as were cloiſtered in monaſteries, the reſt being all ſoldiers or peaſants. And, unfortunately, the firſt rudiments of ſcience which they imbibed were thoſe of Ariſtotle's philoſophy, conveyed through the medium of his Arabian commentators; which were brought from the eaſt by the Saracens into Paleſtine and Spain, and tranſlated into barbarous Latin. So that, though the materials upon which they were naturally employed, in the infancy of a riſing ſtate, were thoſe of the nobleſt kind; the eſtabliſhment of religion, and the regulations of civil polity, yet having only ſuch tools to work with, their execution was trifling and flimſy. Both the divinity and the law of thoſe times were therefore frittered into logical diſtinctions, and drawn out into metaphyſical ſubtilties, with a ſkill moſt amazingly artificial; but which ſerves no other purpoſe, than to ſhew the vaſt powers of the human intellect, however vainly or prepoſterouſly employed. Hence law in particular, which (being intended for univerſal reception) ought to be a plain rule of action, became a ſcience of the greateſt intricacy; eſpecially when blended with the new refinements engrafted upon feodal property: which refinements were from time to time gradually introduced by the Norman practitioners,

ers, with a view to ſuperſede (as they did in great meaſure) the more homely, but more intelligible, maxims of diſtributive juſtice among the Saxons. And, to ſay the truth, theſe ſcholaſtic reformers have tranſmitted their dialect and fineſſes [418] to poſterity, ſo interwoven in the body of our legal polity, that they cannot now be taken out without a manifeſt injury to the ſubſtance. Statute after ſtatute has in later times been made, to pare off theſe troubleſome excreſcences, and reſtore the common law to it's priſtine ſimplicity and vigour; and the endeavour has greatly ſucceeded: but ſtill the ſcars are deep and viſible; and the liberality of our modern courts of juſtice is frequently obliged to have recourſe to unaccountable fictions and circuities, in order to recover that equitable and ſubſtantial juſtice, which for a long time was totally buried under the narrow rules and fanciful niceties of metaphyſical and Norman juriſprudence.

4. A FOURTH innovation was the introduction of the trial by combat, for the deciſion of all civil and criminal queſtions of fact in the laſt reſort. This was the immemorial practice of all the northern nations; but firſt reduced to regular and ſtated forms among the Burgundi, about the cloſe of the fifth century: and from them it paſſed to other nations, particularly the Franks and the Normans; which laſt had the honour to eſtabliſh it here, though clearly an unchriſtian, as well as moſt uncertain, method of trial. But it was a ſufficient recommendation of it to the conqueror and his warlike countrymen, that it was the uſage of their native duchy of Normandy.

5. BUT the laſt and moſt important alteration, both in our civil and military polity, was the engrafting on all landed eſtates, a few only excepted, the fiction of feodal tenure; which drew after it a numerous and oppreſſive train of ſervile fruits and appendages; aids, reliefs, primer ſeiſins, wardſhips, marriages, eſcheats, and fines for alienation; the genuine conſequences of the maxim then adopted, that all the lands in England were derived from, and holden, mediately or immediately, of the crown.

THE nation at this period ſeems to have groaned under an abſolute a ſlavery, as was in the power of a warlike, an ambitious, and a politic prince to create. The conſciences of [419] men were enſlaved by four eccleſiaſtics, devoted to a foreign power, and unconnected with the civil ſtate under which they lived: who now imported from Rome for the firſt time the whole *farrago* of ſuperſtitious novelties, which had been engendered by the blindneſs and corruption of the times, between the firſt miſſion of Auguſtin the monk, and the Norman conqueſt; ſuch as tranſubſtantiation, purgatory, communion in one kind, and the worſhip of ſaints and images; not forgetting the univerſal ſupremacy and dogmatical infallibility of the holy ſee. The laws too, as well as the prayers, were adminiſtered in an unknown tongue. The antient trial by jury gave way to the impious deciſion by battel. The foreſt laws totally reſtrained all rural pleaſures and manly recreations. And in cities and towns the caſe was no better; all company being obliged to diſperſe, and fire and candle to be extinguiſhed, by eight at night, at the ſound of the melancholy *curfeu*. The ultimate property of all lands, and a conſiderable ſhare of the preſent profits, were veſted in the king, or by him granted out to his Norman favourites; who, by a gradual progreſſion of ſlavery, were abſolute vaſſals to the crown, and as abſolute tyrants to the commons. Unheard-of forfeitures, talliages, aids, and fines, were arbitrarily extracted from the pillaged landholders, in purſuance of the new ſyſtem of tenure. And, to crown all, as a conſequence of the tenure by knight-ſervice, the king had always ready at his command an army of ſixty thouſand knights or *milites*: who were bound, upon pain of confiſcating their eſtates, to attend him in time of invaſion, or to quell any domeſtic inſurrection. Trade, or foreign merchandiſe, ſuch as it then was, was carried on by the Jews and Lombards; and the very name of an Engliſh fleet, which king Edgar had rendered ſo formidable, was utterly unknown to Europe: the nation conſiſting wholly of the clergy, who were alſo the lawyers; the barons, or great lords of the land; the knights or ſoldiery, who were the ſubordinate landholders; and the

burghers,

burghers, or inferior tradeſmen, who from their inſignificancy happily retained, in their ſocage and burgage tenures, ſome points of their antient freedom. All the reſt were villeins or bondmen. [420]

FROM ſo complete and well-concerted a ſcheme of ſervility, it has been the work of generations for our anceſtors, to redeem themſelves and their poſterity into that ſtate of liberty which we now enjoy: and which therefore is not to be looked upon as conſiſting of mere encroachments on the crown, and infringements on the prerogative, as ſome ſlaviſh and narrow minded writers in the laſt century endeavoured to maintain: but as, in general, a gradual reſtoration of that antient conſtitution, whereof our Saxon forefathers had been unjuſtly deprived, partly by the policy, and partly by the force, of the Norman. How that reſtoration has, in a long ſeries of years, been ſtep by ſtep effected, I now proceed to inquire.

WILLIAM RUFUS proceeded on his father's plan, and in ſome points extended it; particularly with regard to the foreſt laws. But his brother and ſucceſſor, Henry the firſt, found it expedient, when firſt he came to the crown, to ingratiate himſelf with the people; by reſtoring (as our monkiſh hiſtorians tell us) the laws of king Edward the confeſſor. The ground whereof is this: that by charter he gave up the great grievances of marriage, ward, and relief, the beneficial pecuniary *fruits* of his feodal tenures; but reſerved the tenures themſelves, for the ſame military purpoſes that his father introduced them. He alſo aboliſhed the *curfeu*[e]; for, though it is mentioned in our laws a full century afterwards[f], yet it is rather ſpoken of as a known *time* of night (ſo denominated from that abrogated uſage) than as a ſtill ſubſiſting cuſtom. There is extant a code of laws in his name, conſiſting partly of thoſe of the confeſſor, but with great additions and alterations of his own; and chiefly calculated for the regula-

[e] Spelm. *Cod. LL. W. I.* 288. *Hen. I.* 299. [f] *Stat. Civ. Lond.* 13 Edw. I.

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tion of the county courts. It contains ſome directions as to crimes and their puniſhments, (that of theft being made capital in his reign,) and a few things relating to eſtates, parti-
[421] cularly as to the deſcent of lands: which being by the Saxon laws equally to all the ſons, by the feodal or Norman to the eldeſt only, king Henry here moderated the difference; directing the eldeſt ſon to have only the principal eſtate, "*primum patris feudum*," the reſt of his eſtates, if he had any others, being equally divided among them all. On the other hand, he gave up to the clergy the free election of biſhops and mitred abbots; reſerving however theſe enſigns of patronage, *conge d' eſlire*, cuſtody of the temporalities when vacant, and homage upon their reſtitution. He laſtly united again for a time the civil and eccleſiaſtical courts, which union was ſoon diſſolved by his Norman clergy: and, upon that final diſſolution, the cognizance of teſtamentary cauſes ſeems to have been firſt given to the eccleſiaſtical court. The reſt remained as in his father's time: from whence we may eaſily perceive how far ſhort this was of a thorough reſtitution of king Edward's, or the Saxon, laws.

THE uſurper Stephen, as the manner of uſurpers is, promiſed much at his acceſſion, eſpecially with regard to redreſſing the grievances of the foreſt laws, but performed no great matter either in that or in any other point. It is from his reign however, that we are to date the introduction of the Roman civil and canon laws into this realm: and at the ſame time was imported the doctrine of appeals to the court of Rome, as a branch of the canon law.

BY the time of king Henry the ſecond, if not earlier, the charter of Henry the firſt ſeems to have been forgotten: for we find the claim of marriage, ward, and relief, then flouriſhing in full vigour. The right of primogeniture ſeems alſo to have tacitly revived, being found more convenient for the public than the parcelling of eſtates into a multitude of minute ſubdiviſions. However in this prince's reign much was done to methodize the laws, and reduce them into a re-

gular order; as appears from that excellent treatiſe of Glanvil: which, though ſome of it be now antiquated and altered, yet, when compared with the code of Henry the firſt, it carries a manifeſt ſuperiority[s]. Throughout his reign alſo [422] was continued the important ſtruggle, which we have had occaſion ſo often to mention, between the laws of England and Rome; the former ſupported by the ſtrength of the temporal nobility, when endeavoured to be ſupplanted in favour of the latter by the popiſh clergy. Which diſpute was kept on foot till the reign of Edward the firſt: when the laws of England, under the new diſcipline introduced by that ſkilful commander, obtained a complete and permanent victory. In the preſent reign, of Henry the ſecond, there are four things which peculiary merit the attention of a legal antiquarian: 1. The conſtitution of the parliament at Clarendon, *A. D.* 1164, whereby the king checked the power of the pope and his clergy, and greatly narrowed the total exemption they claimed from the ſecular juriſdiction: though his farther progreſs was unhappily ſtopped, by the fatal event of the diſputes between him and archbiſhop Becket. 2. The inſtitution of the office of juſtices of eyre, *in itinere*; the king having divided the kingdom into ſix circuits, (a little different from the preſent,) and commiſſioned theſe new created judges to adminiſter juſtice, and try writs of aſſize, in the ſeveral counties. Theſe remedies are ſaid to have been then firſt invented: before which all cauſes were uſually terminated in the county courts, according to the Saxon cuſtom; or before the king's juſticiaries in the *aula regis*, in purſuance of the Norman regulations. The latter of which tribunals, travelling about with the king's perſon, occaſioned intolerable expenſe and delay to the ſuitors; and the former, however proper for little debts and minute actions, where even injuſtice is better than procraſtination, were now become liable to too much ignorance of the law, and too much partiality as to facts, to determine matters of conſiderable moment. 3. The introduction and eſtabliſhment of the grand

[s] Hal. Hiſt. C. L. 138.

aſſiſe,

aſſiſe, or trial by ſpecial kind of jury in a writ of right, at the option of the tenant or defendant, inſtead of the barbarous and Norman trial by battel. 4. To this time muſt alſo be referred the introduction of eſcuage, or pecuniary com-
[423] mutation for perſonal military ſervice; which in proceſs of time was the parent of the antient ſubſidies granted to the crown by parliament, and the land tax of later times.

RICHARD the firſt, a brave and magnanimous prince, was a ſportſman as well as a ſoldier; and therefore enforced the foreſt laws with ſome rigour; which occaſioned many diſcontents among his people: though (according to Matthew Paris) he repealed the penalties of caſtration, loſs of eyes, and cutting off the hands and feet, before inflicted on ſuch as tranſgreſſed in hunting; probably finding that their ſeverity prevented proſecutions. He alſo, when abroad, compoſed a body of naval laws at the iſle of Oleron: which are ſtill extant, and of high authority: for in his time we began again to diſcover, that (as an iſland) we were naturally a maritime power. But, with regard to civil proceedings, we find nothing very remarkable in this reign, except a few regulations regarding the Jews, and the juſtices in eyre: the king's thoughts being chiefly taken up by the knight errantry of a croiſade againſt the Saracens in the holy land.

IN king John's time, and that of his ſon Henry the third, the rigours of the feodal tenures and the foreſt laws were ſo warmly kept up, that they occaſioned many inſurrections of the barons or principal feudatories: which at laſt had this effect, that firſt king John, and afterwards his ſon, conſented to the two famous charters of Engliſh liberties, *magna carta*, and *carta de foreſta*. Of theſe the latter was well calculated to redreſs many grievances, and encroachments of the crown, in the exertion of foreſt law: and the former confirmed many liberties of the church, and redreſſed many grievances incident to feodal tenures, of no ſmall moment at the time; though now, unleſs conſidered attentively and with this retroſpect, they ſeem but of trifling concern. But,

beſides theſe feodal proviſions, care was alſo taken therein to protect the ſubject againſt other oppreſſions, then frequently ariſing from unreaſonable amercements, from illegal diſtreſſes or other proceſs for debts or ſervices due to the crown, and [424] from the tyrannical abuſe of the prerogative of purveyance and pre-emption. It fixed the forfeiture of lands for felony in the ſame manner as it ſtill remains; prohibited for the future the grants of excluſive fiſheries; and the erection of new bridges ſo as to oppreſs the neighbourhood. With reſpect to private rights: it eſtabliſhed the teſtamentary power of the ſubject over part of his perſonal eſtate, the reſt being diſtributed among his wife and children; it laid down the law of dower, as it hath continued ever ſince; and prohibited the appeals of women, unleſs for the death of their huſbands. In matters of public police and national concern: it enjoined an uniformity of weights and meaſures; gave new encouragements to commerce, by the protection of merchant ſtrangers; and forbad the alienation of lands in mortmain. With regard to the adminiſtration of juſtice: beſides prohibiting all denials or delays of it, it fixed the court of common pleas at Weſtminſter, that the ſuitors might no longer be haraſſed with following the king's perſon in all his progreſſes; and at the ſame time brought the trial of iſſues home to the very doors of the freeholders, by directing aſſiſes to be taken in the proper counties, and eſtabliſhing annual circuits: it alſo corrected ſome abuſes then incident to the trials by wager of law and of battel; directed the regular awarding of inqueſt for life or member; prohibited the king's inferior miniſters from holding pleas of the crown, or trying any criminal charge, whereby many forfeitures might otherwiſe have unjuſtly accrued to the exchequer; and regulated the time and place of holding the inferior tribunals of juſtice, the county court, ſheriff's tourn, and court-leet. It confirmed and eſtabliſhed the liberties of the city of London, and all other cities, boroughs, towns, and ports of the kingdom. And, laſtly, (which alone would have merited the title that it bears, of the *great* charter,) it protected every individual of the nation in the free enjoyment of his life, his liberty,

liberty, and his property, unleſs declared to be forfeited by the judgment of his peers or the law of the land (3).

[425] HOWEVER, by means of theſe ſtruggles, the pope in the reign of king John gained a ſtill greater aſcendant here, than he ever had before enjoyed; which continued through the long reign of his ſon Henry the third: in the beginning of whoſe time the old Saxon trial by ordeal was alſo totally aboliſhed. And we may by this time perceive, in Bracton's treatiſe, a ſtill farther improvement in the method and regularity of the common law, eſpecially in the point of pleadings[h]. Nor muſt it be forgotten, that the firſt traces which remain, of the ſeparation of the greater barons from the leſs, in the conſtitution of parliaments, are found in the great charter of king John; though omitted in that of Henry III: and that, towards the end of the latter of theſe reigns, we find the firſt record of any writ for ſummoning knights, citizens, and burgeſſes to parliament. And here we conclude the ſecond period of our Engliſh legal hiſtory.

III. THE third commences with the reign of Edward the firſt; who hath juſtly been ſtiled our Engliſh Juſtinian. For in his time the law did receive ſo ſudden a perfection, that ſir Matthew Hale does not ſcruple to affirm[i], that more was done in the firſt thirteen years of his reign to ſettle and eſtabliſh the diſtributive juſtice of the kingdom, than in all the ages ſince that time put together.

[h] Hal. Hiſt. C. L. 156. [i] *Ibid.* 158.

(3) The following is the celebrated 29th chapter of *magna charta*, the foundation of the liberty of Engliſhmen:

Nullus liber homo capiatur, vel impriſonetur, aut diſſeiſiatur de libero tenemento ſuo vel libertatibus vel liberis conſuetudinibus ſuis, aut utlagetur, aut exulet, aut aliquo modo deſtruatur, nec ſuper eum ibimus, nec ſuper eum mittemus, niſi per legale judicium parium ſuorum vel per legem terræ. Nulli vendemus, nulli negabimus, aut differemus rectum vel juſtitiam.

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IT would be endleſs to enumerate all the particulars of theſe regulations; but the principal may be reduced under the following general heads. 1. He eſtabliſhed, confirmed, and ſettled, the great charter and charter of foreſts. 2. He gave a mortal wound to the encroachments of the pope and his clergy, by limiting and eſtabliſhing the bounds of eccleſiaſtical juriſdiction: and by obliging the ordinary, to whom all the goods of inteſtates at that time belonged, to diſcharge the debts of the deceaſed. 3. He defined the limits of the ſeveral temporal courts of the higheſt juriſdiction, thoſe of the king's bench, common pleas, and exchequer; ſo as they might not interfere with each other's proper buſineſs: [426] to do which, they muſt now have recourſe to a fiction, very neceſſary and beneficial in the preſent enlarged ſtate of property. 4. He ſettled the boundaries of the inferior courts in counties, hundreds, and manors: confining them to cauſes of no great amount, according to their primitive inſtitution; though of conſiderably greater, than by the alteration of the value of money they are now permitted to determine. 5. He ſecured the property of the ſubject, by aboliſhing all arbitrary taxes and talliages, levied without conſent of the national council. 6. He guarded the common juſtice of the kingdom from abuſes, by giving up the royal prerogative of ſending mandates to interfere in private cauſes. 7. He ſettled the form, ſolemnities, and effect, of fines levied in the court of common pleas; though the thing itſelf was of Saxon original. 8. He firſt eſtabliſhed a repoſitory for the public records of the kingdom; few of which are antienter than the reign of his father, and thoſe were by him collected. 9. He improved upon the laws of king Alfred, by that great and orderly method of watch and ward, for preſerving the public peace and preventing robberies, eſtabliſhed by the ſtatute of Wincheſter. 10. He ſettled and reformed many abuſes incident to tenures, and removed ſome reſtraints on the alienation of landed property, by the ſtatute of *quia emptores*. 11. He inſtituted a ſpeedier way for the recovery of debts, by granting execution not only upon goods and chattels, but alſo upon lands, by writ of *elegit*; which was

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of ſignal benefit to a trading people: and, upon the ſame commercial ideas, he alſo allowed the charging of lands in a ſtatute merchant, to pay debts contracted in trade, contrary to all feodal principles. 12. He effectually provided for the recovery of advowſons, as temporal rights, in which, before, the law was extremely deficient. 13. He alſo effectually cloſed the great gulph, in which all the landed property of the kingdom was in danger of being ſwallowed, by his re-iterated ſtatutes of mortmain; moſt admirably adapted to meet the frauds that had then been deviſed, though afterwards contrived to be evaded by the invention of uſes.
[427] 14. He eſtabliſhed a new limitation of property by the creation of eſtates tail; concerning the good policy of which, modern times have however entertained a very different opinion. 15. He reduced all Wales to the ſubjection, not only of the crown, but in great meaſure of the laws, of England (which was thoroughly completed in the reign of Henry the eighth); and ſeems to have entertained a deſign of doing the like by Scotland, ſo as to have formed an entire and complete union of the iſland of Great Britain.

I MIGHT continue this catalogue much farther—but, upon the whole, we may obſerve, that the very ſcheme and model of the adminiſtration of common juſtice between party and party, was entirely ſettled by this king[k]; and has continued nearly the ſame, in all ſucceeding ages, to this day; abating ſome few alterations, which the humour or neceſſity of ſubſequent times hath occaſioned. The forms of writs, by which actions are commenced, were perfected in his reign, and eſtabliſhed as models for poſterity. The pleadings, conſequent upon the writs, were then ſhort, nervous, and perſpicuous; not intricate, verboſe, and formal. The legal treatiſes, written in his time, as *Britton*, Fleta, Hengham, and the reſt, are, for the moſt part, law at this day; or at leaſt *were* ſo, till the alteration of tenures took place. And, to conclude, it is from this period, from

[k] Hal. Hiſt. C. L. 162.

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the exact observation of magna carta, rather than from it's making or renewal, in the days of his grandfather and father, that the liberty of Englishmen began again to raise it's head, though the weight of the military tenures hung heavy upon it for many ages after.

I CANNOT give a better proof of the excellence of his constitutions, than that from his time to that of Henry the eighth there happened very few, and those not very considerable, alterations in the legal *forms* of proceedings. As to matter of *substance*: the old Gothic powers of electing the principal subordinate magistrates, the sheriffs, and conservators of the peace, were taken from the people in the reigns [428] of Edward II. and Edward III.; and justices of the peace were established instead of the latter. In the reign also of Edward the third the parliament is supposed most probably to have assumed it's present form; by a separation of the commons from the lords. The statute for defining and ascertaining treasons was one of the first productions of this new-modelled assembly; and the translation of the law proceedings from French into Latin another. Much also was done, under the auspices of this magnanimous prince, for establishing our domestic manufactures; by prohibiting the exportation of English wool, and the importation or wear of foreign cloth or furs; and by encouraging clothworkers from other countries to settle here. Nor was the legislature inattentive to many other branches of commerce, or indeed to commerce in general: for, in particular, it enlarged the credit of the merchant, by introducing the statute staple; whereby he might the more readily pledge his lands for the security of his mercantile debts. And, as personal property now grew, by the extension of trade, to be much more considerable than formerly, care was taken, in case of intestacies, to appoint administrators particularly nominated by the law; to distribute that personal property among the creditors and kindred of the deceased, which before had been usually applied, by the officers of the ordinary, to uses then denominated pious. The statutes also of *praemunire*, for effec-

tually depreſſing the civil power of the pope, were the work of this and the ſubſequent reign. And the eſtabliſhment of a laborious parochial clergy, by the endowment of vicarages out of the overgrown poſſeſſions of the monaſteries, added luſtre to the cloſe of the fourteenth century: though the ſeeds of the general reformation, which were thereby firſt ſown in the kingdom, were almoſt overwhelmed by the ſpirit of perſecution, introduced into the laws of the land by the influence of the regular clergy.

FROM this time to that of Henry the ſeventh, the civil wars and diſputed titles to the crown gave no leiſure for farther
[429] juridical improvement: "*nam ſilent leges inter arma.*"—And yet it is to theſe very diſputes that we owe the happy loſs of all the dominions of the crown on the continent of France; which turned the minds of our ſubſequent princes entirely to domeſtic concerns. To theſe likewiſe we owe the method of barring entails by the fiction of *common recoveries*, invented originally by the clergy, to evade the ſtatutes of mortmain, but introduced under Edward the fourth, for the purpoſe of unfettering eſtates, and making them more liable to forfeiture: while, on the other hand, the owners endeavoured to protect them by the univerſal eſtabliſhment of *uſes*, another of the clerical inventions.

IN the reign of king Henry the ſeventh, his miniſters (not to ſay the king himſelf) were more induſtrious in hunting out proſecutions upon old and forgotten penal laws, in order to extort money from the ſubject, than in framing any new beneficial regulations. For the diſtinguiſhing character of this reign, was that of amaſſing treaſure in the king's coffers, by every means that could be deviſed: and almoſt every alteration in the laws, however ſalutary or otherwiſe in their future conſequences, had this and this only for their great and immediate object. To this end the court of ſtar-chamber was new-modelled, and armed with powers, the moſt dangerous and unconſtitutional, over the perſons and properties of the ſubject.

ſubject. Informations were allowed to be received, in lieu of indictments, at the aſſiſes and ſeſſions of the peace, in order to multiply fines and pecuniary penalties. The ſtatute of fines for landed property was craftily and covertly contrived, to facilitate the deſtruction of entails, and make the owners of real eſtates more capable to forfeit as well as to aliene. The benefit of clergy (which ſo often intervened to ſtop attainders and ſave the inheritance) was now allowed only once to lay offenders, who only could have inheritances to loſe. A writ of *capias* was permitted in all actions on the caſe, and the defendant might in conſequence be outlawed; becauſe upon ſuch outlawry his goods became the property of the crown. In ſhort, there is hardly a ſtatute in this reign, introductive of a new law or modifying the old, but what either directly or obliquely tended to the emolument of the exchequer. [430]

IV. THIS brings us to the fourth period of our legal hiſtory, *viz.* the reformation of religion, under Henry the eighth, and his children; which opens an entirely new ſcene in eccleſiaſtical matters; the uſurped power of the pope being now for ever routed and deſtroyed, all his connexions with this iſland cut off, the crown reſtored to it's ſupremacy over ſpiritual men and cauſes, and the patronage of biſhopricks being once more indiſputably veſted in the king. And, had the ſpiritual courts been at this time re-united to the civil, we ſhould have ſeen the old Saxon conſtitution with regard to *eccleſiaſtical* polity completely reſtored.

WITH regard alſo to our *civil* polity, the ſtatute of wills, and the ſtatute of uſes, (both paſſed in the reign of this prince,) made a great alteration as to property: the former by allowing the *deviſe* of real eſtates by will; which before was in general forbidden; the latter, by endeavouring to deſtroy the intricate nicety of *uſes*, though the narrowneſs and pedantry of the court of common law prevented this ſtatute from having it's full beneficial effect. And thence the courts of equity

aſſumed a juriſdiction, dictated by common juſtice and common ſenſe; which, however arbitrarily exerciſed or productive of jealouſies in it's infancy, has at length been matured into a moſt elegant ſyſtem of rational juriſprudence; the principles of which (notwithſtanding they may differ in forms) are now equally adopted by the courts of both law and equity. From the ſtatute of uſes, and another ſtatute of the ſame antiquity, (which protected eſtates for years from being deſtroyed by the reverſioner,) a remarkable alteration took place in the mode of conveyancing: the antient aſſurance by feoffment and livery upon the land being now very ſeldom practiſed, ſince the more eaſy and more private invention of transferring property, by ſecret conveyances to uſes, and long terms of years being now continually created in mortgages
[431] and family ſettlements, which may be moulded to a thouſand uſeful purpoſes by the ingenuity of an able artiſt.

THE farther attacks in this reign upon the immunity of eſtates-tail, which reduced them to little more than the conditional fees at the common law, before the paſſing of the ſtatute *de donis*; the eſtabliſhment of recognizances in the nature of a ſtatute-ſtaple, for facilitating the raiſing of money upon landed ſecurity; and the introduction of the bankrupt laws, as well for the puniſhment of the fraudulent, as the relief of the unfortunate, traders; all theſe were capital alterations of our legal polity, and highly convenient to that character, which the Engliſh began now to re-aſſume, of a great commercial people. The incorporation of Wales with England, and the more uniform adminiſtration of juſtice, by deſtroying ſome counties palatine, and abridging the unreaſonable privileges of ſuch as remained, added dignity and ſtrength to the monarchy: and, together with the numerous improvements before obſerved upon, and the redreſs of many grievances and oppreſſions which had been introduced by his father, will ever make the adminiſtration of Henry VIII. a very diſtinguiſhed aera in the annals of juridical hiſtory.

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It muſt be however remarked, that (particularly in his later years) the royal prerogative was then ſtrained to a very tyrannical and oppreſſive height; and, what was the worſt circumſtance, it's encroachments were eſtabliſhed by law, under the ſanction of thoſe puſillanimous parliaments; one of which to it's eternal diſgrace paſſed a ſtatute, whereby it was enacted that the king's proclamations ſhould have the force of acts of parliament; and others concurred in the creation of that amazing heap of wild and new-fangled treaſons, which were ſlightly touched upon in a former chapter[1]. Happily for the nation, this arbitrary reign was ſucceeded by the minority of an amiable prince; during the ſhort ſunſhine of which, great part of theſe extravagant laws were repealed. And, to do juſtice to the ſhorter reign of queen Mary, many ſalutary and popular laws, in civil matters, were made [432] under her adminiſtration; perhaps the better to reconcile the people to the bloody meaſures which ſhe was induced to purſue, for the re-eſtabliſhment of religious ſlavery: the well-concerted ſchemes for effecting which, were (through the providence of God) defeated by the ſeaſonable acceſſion of queen Elizabeth.

THE religious liberties of the nation being, by that happy event, eſtabliſhed (we truſt) on an eternal baſis; (though obliged in their infancy to be guarded, againſt papiſts and other non-conformiſts, by laws of too ſanguinary a nature,) the foreſt laws having fallen into diſuſe; and the adminiſtration of civil rights in the courts of juſtice being carried on in a regular courſe, according to the wiſe inſtitutions of king Edward the firſt, without any material innovations; all the principal grievances introduced by the Norman conqueſt ſeem to have been gradually ſhaken off, and our Saxon conſtitution reſtored, with conſiderable improvements: except only in the continuation of the military tenures, and a few other points, which ſtill armed the crown with a very op-

[1] See pag. 86.

preſſive and dangerous prerogative. It is alſo to be remarked, that the ſpirit of enriching the clergy and endowing religious houſes had (through the former abuſe of it) gone over to ſuch a contrary extreme, and the princes of the houſe of Tudor and their favourites had fallen with ſuch avidity upon the ſpoils of the church, that a decent and honourable maintenance was wanting to many of the biſhops and clergy. This produced the *reſtraining* ſtatutes, to prevent the alienations of lands and tithes belonging to the church and univerſities. The number of indigent perſons being alſo greatly increaſed, by withdrawing the alms of the monaſteries, a plan was formed in the reign of queen Elizabeth, more humane and beneficial than even feeding and cloathing of millions; by affording them the means (with proper induſtry) to feed and to cloath themſelves. And, the farther any ſubſequent plans for maintaining the poor have departed from this inſtitution, the more impracticable and even pernicious their viſionary attempts have proved.

[433] HOWEVER, conſidering the reign of queen Elizabeth in a great and political view, we have no reaſon to regret many ſubſequent alterations in the Engliſh conſtitution. For, though in general ſhe was a wiſe and excellent princeſs, and loved her people; though in her time trade flouriſhed, riches increaſed, the laws were duly adminiſtered, the nation was reſpected abroad, and the people happy at home; yet, the increaſe of the power of the ſtar-chamber, and the erection of the high commiſſion court in matters eccleſiaſtical, were the work of her reign. She alſo kept her parliaments at a very awful diſtance: and in many particulars ſhe, at times, would carry the prerogative as high as her moſt arbitrary predeceſſors. It is true, ſhe very ſeldom exerted this prerogative, ſo as to oppreſs individuals; but ſtill ſhe had it to exert: and therefore the felicity of her reign depended more on her want of opportunity and inclination, than want of power to play the tyrant. This is a high encomium on her merit; but at the ſame time it is ſufficient to ſhew, that theſe were not

thoſe golden days of genuine liberty that we formerly were taught to believe: for, ſurely, the true liberty of the ſubject conſiſts not ſo much in the gracious behaviour, as in the limited power, of the ſovereign.

THE great revolutions that had happened, in manners and in property, had paved the way, by imperceptible yet ſure degrees, for as great a revolution in government; yet, while that revolution was effecting, the crown became more arbitrary than ever, by the progreſs of thoſe very means which afterwards reduced it's power. It is obvious to every obſerver, that, till the cloſe of the Lancaſtrian civil wars, the property and the power of the nation were chiefly divided between the king, the nobility, and the clergy. The commons were generally in a ſtate of great ignorance; their perſonal wealth, before the extenſion of trade, was comparatively ſmall; and the nature of their landed property was ſuch, as kept them in continual dependence upon their feodal lord, being uſually ſome powerful baron, ſome opulent abbey, or ſometimes the king himſelf. Though a notion of general [434] liberty had ſtrongly pervaded and animated the whole conſtitution, yet the particular liberty, the natural equality, and perſonal independence of individuals, were little regarded or thought of; nay even to aſſert them was treated as the height of ſedition and rebellion. Our anceſtors heard, with deteſtation and horror, thoſe ſentiments rudely delivered, and puſhed to moſt abſurd extremes, by the violence of a Cade and a Tyler; which have ſince been applauded, with a zeal almoſt riſing to idolatry, when ſoftened and recommended by the eloquence, the moderation, and the arguments of a Sidney, a Locke, and a Milton.

BUT when learning, by the invention of printing and the progreſs of religious reformation, began to be univerſally diſſeminated; when trade and navigation were ſuddenly carried to an amazing extent, by the uſe of the compaſs and the conſequent diſcovery of the Indies; the minds of men, thus enlightened

lightened by ſcience and enlarged by obſervation and travel, began to entertain a more juſt opinion of the dignity and rights of mankind. An inundation of wealth flowed in upon the merchants, and middling rank; while the two great eſtates of the kingdom, which formerly had balanced the prerogative, the nobility and clergy, were greatly impoveriſhed and weakened. The popiſh clergy, detected in their frauds and abuſes, expoſed to the reſentment of the populace, and ſtripped of their lands and revenues, ſtood trembling for their very exiſtence. The nobles, enervated by the refinements of luxury, (which knowledge, foreign travel, and the progreſs of the politer arts, are too apt to introduce with themſelves,) and fired with diſdain at being rivalled in magnificence by the opulent citizens, fell into enormous expences; to gratify which they were permitted, by the policy of the times, to diſſipate their overgrown eſtates, and alienate their ancient patrimonies. This gradually reduced their power and their influence within a very moderate bound: while the king, by the ſpoil of the monaſteries and the great increaſe of the cuſtoms, grew rich, independent, and haughty: and the com-
[435] mons were not yet ſenſible of the ſtrength they had acquired, nor urged to examine it's extent by new burthens or oppreſſive taxations, during the ſudden opulence of the exchequer. Intent upon acquiring new riches, and happy in being freed from the inſolence and tyranny of the orders more immediately above them, they never dreamed of oppoſing the prerogative, to which they had been ſo little accuſtomed; much leſs of taking the lead in oppoſition, to which by their weight and their property they were now entitled. The latter years of Henry the eighth were therefore the times of the greateſt deſpotiſm, that have been known in this iſland ſince the death of William the Norman: the prerogative, as it then ſtood by common law, (and much more when extended by act of parliament,) being too large to be endured in a land of liberty.

QUEEN Elizabeth, and the intermediate princes of the Tudor line, had almoſt the ſame legal powers, and ſometimes exerted

exerted them as roughly, as their father king Henry the eighth. But the critical ſituation of that princeſs with regard to her legitimacy, her religion, her enmity with Spain, and her jealouſy of the queen of Scots, occaſioned greater caution in her conduct. She probably, or her able adviſers, had penetration enough to diſcern how the power of the kingdom had gradually ſhifted it's channel, and wiſdom enough not to provoke the commons to diſcover and feel their ſtrength. She therefore drew a veil over the odious part of prerogative; which was never wantonly thrown aſide, but only to anſwer ſome important purpoſe: and, though the royal treaſury no longer overflowed with the wealth of the clergy, which had been all granted out, and had contributed to enrich the people, ſhe aſked for ſupplies with ſuch moderation, and managed them with ſo much œconomy, that the commons were happy in obliging her. Such, in ſhort, were her circumſtances, her neceſſities, her wiſdom, and her good diſpoſition, that never did a prince ſo long and ſo entirely, for the ſpace of half a century together, reign in the affections of the people.

On the acceſſion of king James I, no new degree of royal [436]
power was added to, or exerciſed by, him: but ſuch a ſceptre was too weighty to be wielded by ſuch a hand. The unreaſonable and imprudent exertion of what was then deemed to be prerogative, upon trivial and unworthy occaſions, and the claim of a more abſolute power inherent in the kingly office than had ever been carried into practice, ſoon awakened the ſleeping lion. The people heard with aſtoniſhment doctrines preached from the throne and the pulpit, ſubverſive of liberty and property, and all the natural rights of humanity. They examined into the divinity of this claim, and found it weakly and fallaciouſly ſupported: and common reaſon aſſured them, that, if it were of human origin, no conſtitution could eſtabliſh it without power of revocation, no precedent could ſanctify, no length of time could confirm it. The leaders felt the pulſe of the nation, and found they had

ability

ability as well as inclination to reſiſt it; and accordingly reſiſted and oppoſed it, whenever the puſillanimous temper of the reigning monarch had courage to put it to the trial; and they gained ſome little victories in the caſes of concealments, monopolies, and the diſpenſing power. In the mean time, very little was done for the improvement of private juſtice, except the abolition of ſanctuaries, and the extenſion of the bankrupt laws, the limitation of ſuits and actions, and the regulating of informations upon penal ſtatutes. For I cannot claſs the laws againſt witchcraft and conjuration under the head of improvements; nor did the diſpute between lord Elleſmere and ſir Edward Coke, concerning the powers of the court of chancery, tend much to the advancement of juſtice.

INDEED when Charles the firſt ſucceeded to the crown of his father, and attempted to revive ſome enormities, which had been dormant in the reign of king James, the loans and benevolences extorted from the ſubject, the arbitrary impriſonments for refuſal, the exertion of martial law in time of peace, and other domeſtic grievances, clouded the morning of that
[437] miſguided prince's reign; which, though the noon of it began a little to brighten, at laſt went down in blood, and left the whole kingdom in darkneſs. It muſt be acknowledged that, by the petition of right, enacted to aboliſh theſe encroachments, the Engliſh conſtitution received great alteration and improvement. But there ſtill remained the latent power of the foreſt laws, which the crown moſt unſeaſonably revived. The legal juriſdiction of the ſtar-chamber and high commiſſion courts was alſo extremely great; though their uſurped authority was ſtill greater. And, if we add to theſe the diſuſe of parliaments, the ill-timed zeal and deſpotic proceedings of the eccleſiaſtical governors in matters of mere indifference, together with the arbitrary levies of tonnage and poundage, ſhip-money, and other projects, we may ſee grounds moſt amply ſufficient for ſeeking redreſs in a legal conſtitutional way. This redreſs, when ſought, was alſo conſtitutionally

conſtitutionally given: for all theſe oppreſſions were actually aboliſhed by the king in parliament, before the rebellion broke out, by the ſeveral ſtatutes for triennial parliaments, for aboliſhing the ſtar-chamber and high commiſſion courts, for aſcertaining the extent of foreſts and foreſt-laws, for renouncing ſhip-money and other exactions, and for giving up the prerogative of knighting the king's tenants *in capite* in conſequence of their feodal tenures: though it muſt be acknowledged that theſe conceſſions were not made with ſo good a grace, as to conciliate the confidence of the people. Unfortunately, either by his own miſmanagement, or by the arts of his enemies, the king had loſt the reputation of ſincerity; which is the greateſt unhappineſs that can befal a prince. Though he formerly had ſtrained his prerogative, not only beyond what the genius of the preſent times would bear, but alſo beyond the examples of former ages, he had now conſented to reduce it to a lower ebb than was conſiſtent with monarchical government. A conduct ſo oppoſite to his temper and principles, joined with ſome raſh actions and unguarded expreſſions, made the people ſuſpect that this condeſcenſion was merely temporary. Fluſhed therefore with the ſucceſs they had gained, fired with reſentment for paſt oppreſſions, and dreading the conſequences if the king ſhould regain his [438] power, the popular leaders (who in all ages have called themſelves the *people*) began to grow inſolent and ungovernable; their inſolence ſoon rendered them deſperate: and deſpair at length forced them to join with a ſet of military hypocrites and enthuſiaſts, who overturned the church and monarchy, and proceeded with deliberate ſolemnity to the trial and murder of their ſovereign.

I PASS by the crude and abortive ſchemes for amending the laws in the times of confuſion which followed; the moſt promiſing and ſenſible whereof (ſuch as the eſtabliſhment of new trials, the abolition of feodal tenures, the act of navigation, and ſome others) were adopted in the

V. FIFTH

V. FIFTH period, which I am next to mention, *viz.* after the reſtoration of king Charles II. Immediately upon which, the principal remaining grievance, the doctrine and conſequences of military tenures, were taken away and aboliſhed, except in the inſtance of corruption of inheritable blood, upon attainder of treaſon and felony. And though the monarch, in whoſe perſon the royal government was reſtored, and with it our antient conſtitution, deſerves no commendation from poſterity, yet in his reign, (wicked, ſanguinary, and turbulent as it was,) the concurrence of happy circumſtances was ſuch, that from thence we may date not only the re-eſtabliſhment of our church and monarchy, but alſo the complete reſtitution of Engliſh liberty, for the firſt time, ſince it's total abolition at the conqueſt. For therein not only theſe ſlaviſh tenures, the badge of foreign dominion, with all their oppreſſive appendages, were removed from incumbering the eſtates of the ſubject; but alſo an additional ſecurity of his perſon from impriſonment was obtained, by that great bulwark of our conſtitution, the *habeas corpus* act. Theſe two ſtatutes, with regard to our property and perſons, form a ſecond *magna carta*, as beneficial and effectual as that of Running-Mead. That only pruned the luxuriancies of the feodal ſyſtem; but the ſtatute of Charles the ſecond extirpated all it's
[439] ſlaveries; except perhaps in copyhold tenure; and there alſo they are now in great meaſure enervated by gradual cuſtom, and the interpoſition of our courts of juſtice. *Magna Carta* only, in general terms, declared, that no man ſhall be impriſoned contrary to law: the *habeas corpus* act points him out effectual means, as well to releaſe himſelf, though committed even by the king in council, as to puniſh all thoſe who ſhall thus unconſtitutionally miſuſe him.

To theſe I may add the abolition of the prerogatives of purveyance and pre-emption; the ſtatute for holding triennial parliaments; the teſt and corporation acts, which ſecure both our civil and religious liberties; the abolition of the writ *de haeretico comburendo*; the ſtatute of frauds and perju-

bits, a great and neceſſary ſecurity to private property; the ſtatute for diſtribution of inteſtates' eſtates; and that of amendments and *jeofails*, which cut off thoſe ſuperfluous niceties which ſo long had diſgraced our courts; together with many other wholeſome acts that were paſſed in this reign, for the benefit of navigation and the improvement of foreign commerce: and the whole, when we likewiſe conſider the freedom from taxes and armies which the ſubject then enjoyed, will be ſufficient to demonſtrate this truth, "that the conſtitution of England had arrived to it's full vigour, and "the true balance between liberty and prerogative was happily eſtabliſhed by *law*, in the reign of king Charles the "ſecond."

IT is far from my intention to palliate or defend many very iniquitous proceedings, *contrary to all law*, in that reign, through the artifice of wicked politicians, both in and out of employment. What ſeems inconteſtible is this, that *by the law*[m], as it then ſtood, (notwithſtanding ſome invidious, nay dangerous, branches of the prerogative have ſince been lopped off, and the reſt more clearly defined,) the people had as large a portion of real liberty, as is conſiſtent with a ſtate of ſociety; and ſufficient power, reſiding in their own hands, to aſſert and preſerve that liberty, if invaded by the royal prerogative. For which I need but appeal to the memorable cataſtrophe of the next reign. For when king Charles's deluded brother attempted to enſlave the nation, he found it was beyond his power: the people both could, and did, reſiſt him; and, in conſequence of ſuch reſiſtance, obliged him to quit his enterprize and his throne together. Which introduces us to the laſt period of our legal hiſtory; *viz.* [440]

VI. FROM the revolution in 1688 to the preſent time. In this period many laws have paſſed; as the bill of rights, the

[m] The point of time at which I would chuſe to fix this *theoretical* perfection of our public law, is the year 1679; after the *habeas corpus* act was paſſed, and that for licenſing the preſs had expired: though the years which immediately followed it were times of great *practical* oppreſſion.

toleration

toleration act, the act of ſettlement with it's conditions, the act for uniting England with Scotland, and ſome others: which have aſſerted our liberties in more clear and emphatical terms; have regulated the ſucceſſion of the crown by parliament, as the exigencies of religious and civil freedom required; have confirmed, and exemplified, the doctrine of reſiſtance, when the executive magiſtrate endeavours to ſubvert the conſtitution; have maintained the ſuperiority of the laws above the king, by pronouncing his diſpenſing power to be illegal; have indulged tender conſciences with every religious liberty, conſiſtent with the ſafety of the ſtate; have eſtabliſhed triennial, ſince turned into ſeptennial, elections of members to ſerve in parliament; have excluded certain officers from the houſe of commons: have reſtrained the king's pardon from obſtructing parliamentary impeachments; have imparted to all the lords an equal right of trying their fellow peers; have regulated trials for high treaſon; have afforded our poſterity a hope that corruption of blood may one day be aboliſhed and forgotten; have (by the deſire of his preſent majeſty) ſet bounds to the civil liſt, and placed the adminiſtration of that revenue in hands that are accountable to parliament; and have (by the like deſire) made the judges completely independent of the king, his miniſters, and his ſucceſſors. Yet, though theſe proviſions have, in appearance and nomi-
[441] nally, reduced the ſtrength of the executive power to a much lower ebb than in the preceding period; if on the other hand we throw into the oppoſite ſcale (what perhaps the immoderate reduction of the antient prerogative may have rendered in ſome degree neceſſary) the vaſt acquiſition of force, ariſing from the riot-act, and the annual expedience of a ſtanding army; and the vaſt acquiſition of perſonal attachment, ariſing from the magnitude of the national debt, and the manner of levying thoſe yearly millions that are appropriated to pay the intereſt; we ſhall find that the crown has, gradually and imperceptibly, gained almoſt as much in influence, as it has apparently loſt in prerogative.

THE

THE chief alterations of moment (for the time would fail me to deſcend to *minutiae*) in the adminiſtration of private juſtice during this period, are the ſolemn recognition of the law of nations with reſpect to the rights of embaſſadors: the cutting off, by the ſtatute for the amendment of the law, a vaſt number of excreſcences, that in proceſs of time had ſprung out of the practical part of it: the protection of corporate rights by the improvements in writs of *mandamus*, and informations in nature of *quo warranto*: the regulations of trials by jury, and the admitting witneſſes for priſoners upon oath: the farther reſtraints upon alienation of lands in mortmain: the annihilation of the terrible judgment of *peine fort et dure*: the extenſion of the benefit of clergy, by aboliſhing the pedantic criterion of reading: the counterbalance to this mercy, by the vaſt increaſe of capital puniſhment: the new and effectual methods for the ſpeedy recovery of rents: the improvements which have been made in ejectments for the trying of titles: the introduction and eſtabliſhment of paper credit, by indorſements upon bills and notes, which have ſhewn the legal poſſibility and convenience (which our anceſtors ſo long doubted) of aſſigning a *choſe in action*: the tranſlation of all legal proceedings into the Engliſh language: the erection of courts of conſcience for recovering ſmall debts, and (which is much the better plan) the reformation of county courts: the great ſyſtem of marine juriſprudence, of which the foundations have been laid, by clearly deve- [442]
loping the principles on which policies of inſurance are founded, and by happily applying thoſe principles to particular caſes: and, laſtly, the liberality of ſentiment, which (though late) has now taken poſſeſſion of our courts of common law, and induced them to adopt (where facts can be clearly aſcertained) the ſame principles of redreſs as have prevailed in our courts of equity, from the time that lord Nottingham preſided there; and this, not only where ſpecially impowered by particular ſtatutes, (as in the caſe of bonds, mortgages, and ſet offs,) but by extending the remedial influence of the equitable writ of treſpaſs on the caſe,

according to it's primitive inſtitution by king Edward the firſt, to almoſt every inſtance of injuſtice not remedied by any other proceſs. And theſe, I think, are all the material alterations that have happened with reſpect to private juſtice, in the courſe of the preſent century.

THUS therefore, for the amuſement and inſtruction of the ſtudent, I have endeavoured to delineate ſome rude outlines of a plan for the hiſtory of our laws and liberties; from their firſt riſe, and gradual progreſs, among our Britiſh and Saxon anceſtors, till their total eclipſe at the Norman conqueſt; from which they have gradually emerged, and riſen to the perfection they now enjoy, at different periods of time. We have ſeen, in the courſe of our inquiries, in this and the former volumes, that the fundamental maxims and rules of the law, which regard the rights of perſons, and the rights of things, the private injuries that may be offered to both, and the crimes which affect the public, have been and are every day improving, and are now fraught with the accumulated wiſdom of ages: that the forms of adminiſtering juſtice came to perfection under Edward the firſt; and have not been much varied, nor always for the better, ſince: that our religious liberties were fully eſtabliſhed at the reformation: but that the recovery of our civil and political liberties was a work of longer time; they not being thoroughly and completely regained, till after the reſtoration of king Charles, nor fully
[443] and explicitly acknowledged and defined, till the æra of the happy revolution. Of a conſtitution ſo wiſely contrived, ſo ſtrongly raiſed, and ſo highly finiſhed, it is hard to ſpeak with that praiſe, which is juſtly and ſeverely it's due:—the thorough and attentive contemplation of it will furniſh it's beſt panegyric. It hath been the endeavour of theſe commentaries, however the execution may have ſucceeded, to examine it's ſolid foundations, to mark out it's extenſive plan, to explain the uſe and diſtribution of it's parts, and from the harmonious concurrence of thoſe ſeveral parts to demonſtrate the elegant proportion of the whole. We have taken occaſion

to

to admire at every turn the noble monuments of antient ſimplicity, and the more curious refinements of modern art. Nor have it's faults been concealed from view; for faults it has, leſt we ſhould be tempted to think it of more than human ſtructure: defects, chiefly ariſing from the decays of time, or the rage of unſkilful improvements in later ages. To ſuſtain, to repair, to beautify this noble pile, is a charge intruſted principally to the nobility, and ſuch gentlemen of the kingdom, as are delegated by their country to parliament. The protection of THE LIBERTY of BRITAIN is a duty which they owe to themſelves, who enjoy it; to their anceſtors, who tranſmitted it down; and to their poſterity, who will claim at their hands this, the beſt birthright, and nobleſt inheritance of mankind.

THE END OF THE FOURTH BOOK.

APPENDIX.

§ 1. RECORD *of an Indictment and Conviction of* MURDER, *at the Aſſiſes.*

Warwickſhire, to wit, } BE it remembered, that at the general ſeſſion of the lord the king of *oyer* and *terminer* holden at Warwick in and for the ſaid county of Warwick, on Friday the twelfth day of March in the ſecond year of the reign of the lord George the third, now king of Great Britain, before ſir Michael Foſter, knight, one of the juſtices of the ſaid lord the king aſſigned to hold pleas before the king himſelf, ſir Edward Clive, knight, one of the juſtices of the ſaid lord the king, of his court of common bench, and others their fellows, juſtices of the ſaid lord the king, aſſigned by letters patent of the ſaid lord the king, under his great ſeal of Great Britain, made to them the aforeſaid juſtices and others, and any two or more of them, (whereof one of them the ſaid ſir Michael Foſter and ſir Edward Clive, the ſaid lord the king would have to be one,) to inquire (by the oath of good and lawful men of the county aforeſaid, by whom the truth of the matter might be the better known, and by other ways, methods, and means, whereby they could or might the better know, as well within liberties as without) more fully the truth of all treaſons, miſpriſions of treaſons, inſurrections, rebellions, counterfeitings, clippings, waſhings, falſe coinings, and other falſities of the monies of Great Britain, and of other kingdoms or dominions whatſoever; and of all murders, felonies, manſlaughters, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful uttering of words, unlawful aſſemblies, miſpriſions, confederacies, falſe allegations, treſpaſſes, riots, routs, retentions, eſcapes, contempts, falſities, negligences, concealments, maintenances, oppreſſions, champarties, deceits,

Seſſion of *oyer* and *terminer*.

Commiſſion of

deceits, and all other miſdeeds, offences, and injuries whatſoever, and alſo the acceſſories of the ſame, within the county aforeſaid, as well within liberties as without, by whomſoever and howſoever done, had, perpetrated, and committed, and by whom, to whom, when, how, and in what manner; and of all other articles and circumſtances in the ſaid letters patent of the ſaid lord the king ſpecified; the premiſes and every or any of them howſoever concerning; and for this time to hear and determine the ſaid treaſons and other the premiſes, according to the law and cuſtom of the realm of England; and alſo keepers of the peace, and juſtices of the ſaid lord the king, aſſigned to hear and determine divers felonies, treſpaſſes, and other miſdemeſnors committed within the county aforeſaid, by the oath of ſir James Thomſon, baronet, Charles Roper, Henry Dawes, Peter Wilſon, Samuel Rogers, John Dawſon, James Philips, John Mayo, Richard Savage, William Bell, James Morris, Laurence Hall, and Charles Carter, eſquires, good and lawful men of the county aforeſaid, then and there impanelled, ſworn, and charged to inquire for the ſaid lord the king and for the body of the ſaid county, it is preſented, that Peter Hunt, late of the pariſh of Lighthorne in the ſaid county, gentleman, not having the fear of God before his eyes, but being moved and ſeduced by the inſtigation of the devil, on the fifth day of March in the ſaid ſecond year of the reign of the ſaid lord the king, at the pariſh of Lighthorne aforeſaid, with force and arms, in and upon one Samuel Collins, in the peace of God and of the ſaid lord the king then and there being, felonioufly, wilfully, and of his malice aforethought, did make an aſſault; and that the ſaid Peter Hunt with a certain drawn ſword, made of iron and ſteel, of the value of five ſhillings, which he the ſaid Peter Hunt in his right hand then and there had and held, him the ſaid Samuel Collins, in and upon the left ſide of the belly of him the ſaid Samuel Collins then and there felonioufly, wilfully, and of his malice aforethought, did ſtrike, thruſt, ſtab, and penetrate; giving unto the ſaid Samuel Collins, then and there, with the ſword drawn as aforeſaid, in and upon the left ſide of the belly of him the ſaid Samuel Collins, one mortal wound of the breadth of one inch, and the depth of nine inches; of which ſaid mortal wound he the ſaid Samuel Collins, at the pariſh of Lighthorne aforeſaid in the ſaid county of Warwick, from the ſaid fifth day of March in the year aforeſaid until the ſeventh day of the ſame month in the ſame year, did languiſh, and languiſhing did live; on which ſaid ſeventh day of March in the year aforeſaid, the ſaid Samuel Collins, at the pariſh of Lighthorne aforeſaid, in the county aforeſaid, of the ſaid mortal wound did die: and ſo the jurors aforeſaid, upon their oath aforeſaid, do ſay, that the ſaid Peter Hunt him the ſaid Samuel Collins, in manner and form aforeſaid, felonioufly, wilfully, and of his malice aforethought,

eyer and terminer, and of the peace.

Grand jury.

Indictment

thought, did kill and murder, againſt the peace of the ſaid lord the now king, his crown, and dignity. **Whereupon** the ſheriff of the county aforeſaid is commanded, that he omit not for any liberty in his bailiwick, but that he take the ſaid Peter Hunt, if he may be found in his bailiwick, and him ſafely keep, to anſwer to the felony and murder whereof he ſtands indicted. *Capias.* **Which** ſaid indictment the ſaid juſtices of the lord the king abovenamed, afterwards, to wit, at the delivery of the gaol of the ſaid lord the king, holden at Warwick in and for the county aforeſaid, on Friday the ſixth day of Auguſt in the ſaid ſecond year of the reign of the ſaid lord the king, before the right honourable William lord Mansfield, chief juſtice of the ſaid lord the king, aſſigned to hold pleas before the king himſelf, ſir Sidney Stafford Smythe, knight, one of the barons of the exchequer of the ſaid lord the king, and others their fellows, juſtices of the ſaid lord the king, aſſigned to deliver his ſaid gaol of the county aforeſaid of the priſoners therein being, by their proper hands do deliver here in court of record in form of the law to be determined. Seſſion of gaol-delivery. **And afterwards**, to wit, at the ſame delivery of the gaol of the ſaid lord the king of his county aforeſaid, on the ſaid Friday the ſixth day of Auguſt, in the ſaid ſecond year of the reign of the ſaid lord the king, before the ſaid juſtices of the lord the king laſt abovenamed and others their fellows aforeſaid, here cometh the ſaid Peter Hunt, under the cuſtody of William Browne, eſquire, ſheriff of the county aforeſaid, (in whoſe cuſtody in the gaol of the county aforeſaid, for the cauſe aforeſaid, he had been before committed,) being brought to the bar here in his proper perſon by the ſaid ſheriff, to whom he is here alſo committed: Arraignment. **And** forthwith being demanded concerning the premiſes in the ſaid indictment above ſpecified and charged upon him, how he will acquit himſelf thereof, he ſaith, that he is not guilty thereof; and thereof for good and evil he puts himſelf upon the country: Plea; not guilty. **And** John Blencowe, eſquire, clerk of the aſſiſes for the county aforeſaid, who proſecutes for the ſaid lord the king in his behalf, doth the like: Iſſue. **Therefore** let a jury thereupon here immediately come before the ſaid juſtices of the lord the king laſt abovementioned, and others their fellows aforeſaid, of free and lawful men of the neighbourhood of the ſaid pariſh of Lighthorne in the county of Warwick aforeſaid, by whom the truth of the matter may be the better known, and who are not of kin to the ſaid Peter Hunt, to recognize upon their oath, whether the ſaid Peter Hunt be guilty of the felony and murder in the indictment aforeſaid above ſpecified, or not guilty: becauſe as well the ſaid John Blencowe, who proſecutes for the ſaid lord the king in this behalf, as the ſaid Peter Hunt, have put themſelves upon the ſaid jury. *Venire.* And the jurors of the ſaid jury by the ſaid ſheriff for this purpoſe impanelled and returned, to wit, David Williams, John Smith, Thomas Horne, Charles Nokes,

Richard May, Walter Duke, Matthew Lion, James White, William Bates, Oliver Green, Bartholomew Naſh, and Henry Long, being called, come; who being elected, tried, and ſworn, to ſpeak the truth of and concerning the premiſes, upon their oath ſay, that the ſaid Peter Hunt is guilty of the felony and murder aforeſaid, on him above charged in the form aforeſaid, as by the indictment aforeſaid is above ſuppoſed againſt him; and that the ſaid Peter Hunt at the time of committing the ſaid felony and murder, or at any time ſince to this time, had not nor hath any goods or chattels, lands or tenements, in the ſaid county of Warwick, or elſewhere, to the knowlege of the ſaid jurors. And upon this it is forthwith demanded of the ſaid Peter Hunt, if he hath or knoweth any thing to ſay, wherefore the ſaid juſtices here ought not upon the premiſes and verdict aforeſaid to proceed to judgment and execution againſt him: who nothing farther ſaith, unleſs as he before had ſaid. Whereupon, all and ſingular the premiſes being ſeen, and by the ſaid juſtices here fully underſtood, it is conſidered by the court here, that the ſaid Peter Hunt be taken to the gaol of the ſaid lord the king of the ſaid county of Warwick from whence he came, and from thence to the place of execution on Monday now next enſuing, being the ninth day of this inſtant Auguſt, and there be hanged by the neck until he be dead; and that afterwards his body be diſſected and anatomized.

Verdict; guilty of *murder*.

Judgment of death,

and diſſection.

§ 2. *Conviction of* Manſlaughter.

——— upon their oath ſay, that the ſaid Peter Hunt is not guilty of the murder aforeſaid, above charged upon him; but that the ſaid Peter Hunt is guilty of the felonious ſlaying of the aforeſaid Samuel Collins; and that he had not nor hath any goods or chattels, lands or tenements, at the time of the felony and manſlaughter aforeſaid, or ever afterwards to this time, to the knowlege of the ſaid jurors. And immediately it is demanded of the ſaid Peter Hunt, if he hath or knoweth any thing to ſay, wherefore the ſaid juſtices here ought not upon the premiſes and verdict aforeſaid to proceed to judgment and execution againſt him: who ſaith that he is a clerk, and prayeth the benefit of clergy to be allowed him in this behalf. Whereupon, all and ſingular the premiſes being ſeen, and by the ſaid juſtices here fully underſtood, it is conſidered by the court here, that the ſaid Peter Hunt be burned in his left hand, and delivered. And immediately he is burned in his left hand and is delivered, according to the form of the ſtatute.

Verdict; — not guilty of *murder*; guilty of *manſlaughter*.

Clergy prayed.

Judgment to be burned in the hand, and delivered.

§ 3.

§ 3. *Entry of a Trial* inſtanter *in the Court of King's Bench, upon a collateral Iſſue; and Rule of Court for Execution thereon.*

Michaelmas term, in the ſixth year of the reign of king George the third.

Kent; The King againſt Thomas Rogers. } **The priſoner** at the bar being brought into this court in cuſtody of the ſheriff of the county of Suſſex, by virtue of his majeſty's writ of *habeas corpus*, **it is ordered** that the ſaid writ and the return thereto be filed. *Habeas corpus.* **And** it appearing by a certain record of attainder, which hath been removed into this court by his majeſty's writ of *certiorari*, that the priſoner at the bar ſtands attainted, by the name of Thomas Rogers, of felony for a robbery on the highway, and the ſaid priſoner at the bar having heard the record of the ſaid attainder now read to him, is now aſked by the court here, what he hath to ſay for himſelf, why the Court here ſhould not proceed to award execution againſt him upon the ſaid attainder? **He** for plea ſaith, that he is not the ſame Thomas Rogers in the ſaid record of attainder, named, and againſt whom judgment was pronounced: and this he is ready to verify and prove, *&c.* **To** which ſaid plea the honourable Charles Yorke, eſquire, attorney-general of our preſent ſovereign lord the king, who for our ſaid lord the king in this behalf proſecuteth, being now preſent here in court, and having heard what the ſaid priſoner at the bar hath now alleged, for our ſaid lord the king by way of reply ſaith, that the ſaid priſoner now here at the bar is the ſame Thomas Rogers in the ſaid record of attainder named, and againſt whom judgment was pronounced as aforeſaid; and this he prayeth may be inquired into by the country; and the ſaid priſoner at the bar doth the like: **Therefore** let a jury in this behalf immediately come here into court, by whom the truth of the matter will be the better known, and who have no affinity to the ſaid priſoner, to try upon their oath, whether the ſaid priſoner at the bar be the ſame Thomas Rogers in the ſaid record of attainder named, and againſt whom judgment was ſo pronounced as aforeſaid, or not: becauſe as well the ſaid Charles Yorke, eſquire, attorney-general of our ſaid lord the king, who for our ſaid lord the king in this behalf proſecutes, as the ſaid priſoner at the bar, have put themſelves in this behalf upon the ſaid jury. **And** immediately thereupon the ſaid jury come here into court; and being elected, tried, and ſworn to ſpeak the truth touching and concerning the premiſes aforeſaid, and having heard the ſaid record read to them, do ſay upon their

Record of attainder read; for felony and robbery; Priſoner aſked what he can ſay in bar of execution. Plea; not the ſame perſon. Replication, averring that he is. Iſſue joined. *Venire* awarded *inſtanter.* Jury.

Verdict; that he is the ſame.

oath, that the ſaid priſoner at the bar is the ſame Thomas Rogers in the ſaid record of attainder named, and againſt whom judgment was ſo pronounced as aforeſaid, in manner and form as the ſaid attorney-general hath by his ſaid replication to the ſaid plea of the ſaid priſoner now here at the bar alleged. **And thereupon** the ſaid attorney-general on behalf of our ſaid lord the king now prayeth, that the court here would proceed to award execution againſt him the ſaid Thomas Rogers upon the ſaid attainder. **Whereupon**, all and ſingular the premiſes being now ſeen and fully underſtood by the court here, **it is ordered** by the court here, that execution be done upon the ſaid priſoner at the bar for the ſaid felony in purſuance of the ſaid judgment, according to due form of law: **And** it is laſtly ordered, that he the ſaid Thomas Rogers, the priſoner at the bar, be now committed to the cuſtody of the ſheriff of the county of Kent (now alſo preſent here in court) for the purpoſe aforeſaid; and that the ſaid ſheriff of Kent do execution upon the ſaid defendant the priſoner at the bar for the ſaid felony, in purſuance of the ſaid judgment, according to due form of law.

Award of execution.

On the motion of Mr. Attorney General.

By the Court.

§ 4. *Warrant of Execution on Judgment of Death, at the general Gaol delivery in* London *and* Middleſex.

London and Middleſex. } To the ſheriffs of the city of London; and to the ſheriff of the county of Middleſex: and to the keeper of his majeſty's gaol of Newgate.

Whereas at the ſeſſion of gaol delivery of Newgate, for the city of London and county of Middleſex, holden at Juſtice Hall in the Old Bailey, on the nineteenth day of October laſt, Patrick Mahony, Roger Jones, Charles King, and Mary Smith, received ſentence of death for the reſpective offences in their ſeveral indictments mentioned; **Now it is hereby ordered**, that execution of the ſaid ſentence be made and done upon them the ſaid Patrick Mahony and Roger Jones, on Wedneſday the ninth day of this inſtant month of November at the uſual place of execution. **And** it is his majeſty's command, that execution of the ſaid ſentence upon them the ſaid Charles King and Mary Smith be reſpited, until his majeſty's pleaſure touching them be farther known.

Given under my hand and ſeal this fourth day of November, one thouſand ſeven hundred and ſixty-eight.

James Eyre, Recorder. L. S.

§ 5.

§ 5. *Writ of Execution upon a Judgment of* Murder, *before the* King *in* Parliament.

GEORGE the ſecond, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and ſo forth, to the ſheriffs of London and ſheriff of Middleſex, greeting. Whereas Lawrence earl Ferrers, viſcount Tamworth, hath been indicted of felony and murder by him done and committed, which ſaid indictment hath been certified before us in our preſent parliament; and the ſaid Lawrence earl Ferrers, viſcount Tamworth, hath been thereupon arraigned, and upon ſuch arraignment hath pleaded not guilty; and the ſaid Lawrence earl Ferrers, viſcount Tamworth, hath before us in our ſaid parliament been tried, and in due form of law convicted thereof; and whereas judgment hath been given in our ſaid parliament, that the ſaid Lawrence earl Ferrers, viſcount Tamworth, ſhall be hanged by the neck till he is dead, and that his body be diſſected and anatomized, the execution of which judgment yet remaineth to be done: We require, and by theſe preſents ſtrictly command you, that upon Monday the fifth day of May inſtant, between the hours of nine in the morning and one in the afternoon of the ſame day, him the ſaid Lawrence earl Ferrers, viſcount Tamworth, without the gate of our tower of London (to you then and there to be delivered, as by another writ to the lieutenant of our tower of London or to his deputy directed, we have commanded) into your cuſtody you then and there receive: and him, in your cuſtody ſo being, you forthwith convey to the accuſtomed place of execution at Tyburn: and that you do cauſe execution to be done upon the ſaid Lawrence earl Ferrers, viſcount Tamworth, in your cuſtody ſo being, in all things according to the ſaid judgment. And this you are by no means to omit, at your peril. Witneſs ourſelf at Weſtminſter the ſecond day of May, in the thirty-third year of our reign.

Yorke and Yorke.

THE END.

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☞ *The large numerals denote the volumes; the ciphers the pages of the commentaries; and the ſmall numerals the pages of the appendix.*

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Printed by A. Strahan, Law Printer to His Majeſty,
Printers-Street, London.

3 6105 063 720 150